UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

MOTION TO DISMISS DENIED; MOTIONS TO STRIKE DENIED; CROSS-MOTIONS FOR SUMMARY RELIEF DENIED:
April 30, 2015

CBCA 2647

CORRECTIONS CORPORATION OF AMERICA,

Appellant,

v.

DEPARTMENT OF HOMELAND SECURITY,

Respondent.

Scott M. Heimberg, Andrea T. Vavonese, and Julia Lippman of Akin Gump Strauss Hauer & Feld, LLP, Washington, DC, counsel for Appellant.

Song U. Kim, Mark E. Menacker, and Geoffrey Harriman, Office of the Principal Legal Advisor, Immigration and Customs Enforcement, Department of Homeland Security, Washington, DC, counsel for Respondent.

Before Board Judges **SOMERS**, **VERGILIO**, and **LESTER**.

LESTER, Board Judge.

Pending before the Board are the parties' cross-motions for summary relief, through which we are called to consider the contract clause at Federal Acquisition Regulation (FAR) 52.222-43(b), titled "Fair Labor Standards Act and Service Contract Act – Price Adjustment (Multiple Year and Option Contracts)" (FLSA/SCA Price Adjustment clause), 48 CFR

52.222-43 (2008), regarding the effect of changes in wage determinations. Pursuant to the requirements of that clause, appellant, Corrections Corporation of America (CCA), warranted at the time of contract award that its contract price did not include "any allowance for any contingency to cover" possible future labor cost increases that might result from future Department of Labor (DOL) wage determinations. CCA asserts that, although it imposed a three-percent across-the-board markup to each option year contract line item number (CLIN) in its contract, it did not intend that markup to constitute an escalation of the labor costs subject to the Service Contract Act (SCA), 41 U.S.C. §§ 6701-6707 (2012),[1] within those CLINs. DOL issued a wage determination in 2010 increasing CCA employee wages and benefits, and CCA seeks a consequent increase in its contract price under the FLSA/SCA Price Adjustment clause, correlating with the increased wages that it now must pay. Respondent argues that the truthfulness of CCA's warranty is a condition precedent to any price increase and that CCA's warranty that it did not escalate its option year SCA-related labor costs is untrue. Both parties now seek summary relief, although respondent also asks us to dismiss the appeal for lack of jurisdiction. Also pending before us are respondent's motion to strike two statements by CCA from the record and CCA's motion to strike a supplement to the appeal file.

For the following reasons, we reject respondent's jurisdictional challenge and deny each party's motion to strike. We also deny the parties' cross-motions for summary relief to allow for the development of a more complete record.

Statement of Facts

I. The Contract

Effective April 1, 2009, the Immigration and Customs Enforcement (ICE) component of the Department of Homeland Security awarded a contract to CCA for "the management and operation of a Contractor-owned/Contractor-operated detention facility" for housing federal detainees, with a minimum of one thousand general housing-type beds for male or female detainees at a single facility. Appeal File, Exhibit 2, § C.II.A, at 18.[2] Under the contract, CCA was to "furnish all personnel, management, equipment, supplies, and services necessary" to perform the contract. *Id.*

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[1] The SCA was located at 41 U.S.C. §§ 351-357 (2006) when the parties entered into the contract.

[2] All exhibits referenced in this decision are found in the appeal file, unless otherwise noted.

The contract was for one base year, with four one-year options. Exhibit 2 at 2-7. There were seven line items (CLINs) for the base year, with each CLIN identifying a different service – detention services with a guaranteed minimum of 750 beds, detention services above the guaranteed minimum number of beds, transportation services, and on-call post/guard services, among others – that CCA was to provide. *Id.* at 2-3. The contract specified a unit price for each of those seven CLINs, with the unit for each CLIN being per bed, per hour, or for deliverables to reflect various services and materials provided to accomplish the work. *Id.*

There also were seven CLINs for each of the four option years, all mirroring the seven CLINs from the base year. Exhibit 2 at 3-7. For each option year, CCA escalated the prior year's prices for each CLIN by three percent on an across-the-board basis. *Id.* at 2-7; *see* Appellant's Statement of Undisputed Facts at 3 ("For each of the four option years, the Contract provided for an increase in the per bed price of approximately three percent from the preceding year."). So, for example, CCA's contract established a unit price of $28.35 for each hour of on-call post/guard services in the base year (CLIN 1006); a unit price of $29.20 for those same services in option year I (CLIN 2006); $30.08 in option year II (CLIN 3006); $30.98 in option year III (CLIN 4006); and $31.91 in option year IV (CLIN 5006). Exhibit 2 at 3-7.

The contract included the clause at 48 CFR 52.222-41, Service Contract Act of 1965 (Nov 2007), *see* Exhibit 2, § I-37, at 94, which incorporated DOL wage determination no. 2005-2515, revision no. 7 (Exhibit 2 at 109-18) into the contract. That wage determination defined the minimum monetary wages and fringe benefits that CCA would have to pay its employees for this contract work.

The contract also incorporated by reference the FLSA/SCA Price Adjustment clause at FAR 52.222-43. Exhibit 2, § I-38, at 94. That clause provides that the DOL wage determination current at the beginning of each renewal option period governs the minimum wages that the contractor must pay its employees:

> The wage determination, issued under the Service Contract Act of 1965, as amended, (41 U.S.C. 351, et seq.), by the Administrator, Wage and Hour Division, Employment Standards Administration, U.S. Department of Labor, current on the anniversary date of a multiple year contract or the beginning of each renewal option period, shall apply to this contract.

48 CFR 52.222-43(c). It further provides that the "contract price or contract unit price labor rates will be adjusted to reflect the Contractor's actual increase or decrease in applicable wages and fringe benefits" if DOL, through a new wage determination, changes the wages

that the contractor is required to pay its employees under the contract. 48 CFR 52.222-43(d)(1). The contractor is required to notify the contracting officer of any increase "within 30 days after receiving a new wage determination unless this notification period is extended in writing to the Contracting Officer." *Id.* 52.222-43(f). The notice must contain a statement of the amount claimed and any relevant supporting data, including payroll records, that the contracting officer may reasonably require. *Id.* Upon agreement of the parties, the contract price or contract unit price labor rates are to be modified in writing. *Id.*

As part of its contract, the contractor is required to warrant that its proposed prices do not include "any allowance for any contingency to cover increased costs" for which FAR 52.222-43 provides adjustment:

> The contractor warrants that the prices in this contract do not include any allowance for any contingency to cover increased costs for which adjustment is provided under this clause.

48 CFR 52.222-43(b). The clause also expressly grants the contracting officer or an authorized representative "access to and the right to examine any directly pertinent books, documents, papers and records of the Contractor" for up to three years after final payment. *Id.* 52.222-43(g).

II. CCA's Wage Increase Requests

On July 28, 2009, DOL issued wage determination no. 2005-2515, revision no. 10 (the 2009 wage determination), increasing the minimum wages and benefits for CCA's employees under the contract. Exhibit 7 at 3-11. Subsequently, in February 2010, ICE issued bilateral modification 04, exercising the option for option year I, *see* Exhibit 6 at 1, and, in April 2010, issued bilateral modification 05, incorporating the 2009 wage determination into option year I. Exhibit 7 at 1-2.

In modification 05, ICE stated that CCA had to "notify the contracting officer in writing" within thirty days "of any increase claimed under" the FLSA/SCA Price Adjustment clause, which it would need to "initiate[] by submitting a rate adjustment proposal, along with detailed supporting documentation in accordance with the provisions of FAR 52.222-43." Exhibit 7 at 1-2. CCA submitted a request for equitable adjustment (REA) in response to modification 05 on May 6, 2010. *See* Exhibit 8 at 1. Through modification 06, executed in August 2010, ICE retroactively granted CCA's request for wage and benefit increases for option year I and beyond, corresponding to the 2009 wage determination.

On June 15, 2010, DOL issued wage determination no. 2005-2515, revision no. 12 (the 2010 wage determination), again increasing the minimum wages and benefits that CCA had to pay its employees. Exhibit 12 at 6-14. On March 30, 2011, ICE issued modification 10, exercising the option for option year II and incorporating the 2010 wage determination into option year II. *Id.* at 1. When issuing modification 05, the ICE contracting officer informed CCA that, in evaluating the 2010 wage determination, ICE had discovered that CCA had escalated its original contract pricing by three percent in each successive option year and that he considered that escalation to preclude any adjustments to wages and benefits under the FSLA/SCA Price Adjustment clause. *Id.* at 15.

In response, by letter dated April 12, 2011, CCA requested an equitable adjustment of $967,989.42 annually to offset the increase in wages and benefits imposed by the 2010 wage determination. Exhibit 1, Enclosure 4. In a separate letter that same day, CCA disputed the contracting officer's statement in his March 30, 2011, letter that CCA, in its original contract pricing, had escalated SCA-covered labor costs, as follows:

> Your assumption that our increase in per bed price, of approximately three percent, for each of the option years is for anticipated increases in SCA-covered labor costs is incorrect. In fact, the annual increases in per bed costs are allowances for anticipated inflation in non-SCA costs, including all facility operating expenses except for wage and fringe benefits, along with increases in overhead, and G&A expenses. There is no need to hedge against increases in wages and benefits because FAR 52.222-43 removes the risk that CCA would pay such costs out of its own pocket. Because we are well aware of the benefits and restrictions of the FAR clause we did not include SCA-covered labor costs as part of the pricing of each option year.

Id., Enclosure 2.

On April 18, 2011, the contracting officer wrote to CCA, acknowledging that the FLSA/SCA Price Adjustment clause does not encompass increases in costs unrelated to wages and benefits or prohibit contracts from increasing option year pricing for costs unrelated to wages and benefits. Exhibit 13 at 1. He indicated, though, that the only cost information available to him suggested that the three-percent escalation that CCA had applied to its successive option year pricing "escalated ALL elements" of CCA's cost, including wages and benefits, such that "the increase of the three percent (3%) per year already includes increases for wages and benefits." *Id.* To allow ICE to reevaluate its conclusion, the contracting officer requested pursuant to 48 CFR 52.222-43(g) that CCA provide a breakout of the costs that it had included in its offer for the contract:

> [I]n order to resolve this matter as quickly as possible, please provide me a detailed breakout of your costs used in the award of Contract HSCEDM-09-D-00007 for the base and each option period on separate spreadsheets along with any other supporting data you feel is necessary. It is requested that the information requested be provided by 22 April 2011 in order to expedite this issue.

Id. at 2.

CCA did not provide responsive documentation. Subsequently, by letter dated May 5, 2011, the contracting officer denied CCA's REA "due to the lack of records or documentation supporting entitlement." Exhibit 1, Enclosure 3. He indicated, though, that, "[s]hould the information be made available, your request for equitable adjustment will be reconsidered." *Id.*

On May 11, 2011, CCA requested that the contracting officer reconsider his position, stating that CCA had "met the requirements to receive an equitable adjustment under FAR 52.222-43" and that "CCA is not required to provide the documentation you requested in order to receive the contractually mandated increase in contract price." Exhibit 13 at 3. CCA asserted that a detailed breakout of the manner in which it had calculated its contract costs was unnecessary because, through its offer for the contract, it "has already warranted under FAR 52.222-43(b) . . . that its contract prices did not include a contingency for increased wages and benefits." *Id.* at 4. It also asserted that such information was not "directly pertinent" to CCA's wage and benefits increase request, as required by FAR 52.222-43(g), and therefore was impermissible:

> The FAR does not require CCA [to] provide all of its cost information as you are seeking in your April 18 letter. You cite FAR 52.222-43(g) in support of your expansive request for our costs. That provision, however, only grants ICE access to "directly pertinent" records. FAR 52.222-43 addresses equitable adjustments in price when a contractor is required by DOL to increase wages under the SCA beyond what it is currently paying its SCA-covered labor force. The only records "directly pertinent" to that issue are the records of the wages and benefits being paid labor immediately before and after the new DOL wage determination.

Id. The contracting officer did not respond to CCA's request for reconsideration.

III. CCA's Claim

On June 2, 2011, CCA submitted a certified claim to the ICE contracting officer pursuant to the Disputes clause of the contract, seeking a price adjustment of $967,989.42 "to offset one year's worth of the increase in wages and benefits imposed by" the 2010 wage determination. Exhibit 1, Enclosure 4. It indicated that "a similar adjustment will be required for each subsequent year of performance, subject to any new wage determination issued by the DOL." *Id.*

By letter dated August 17, 2011, the ICE contracting officer, in "an attempt to resolve the issues" surrounding CCA's claim, again asked CCA to provide "a detailed breakout of your costs used in the award of Contract HSCEDM-09-D-00007 for the base and each option period," which he would use "to validate entitlement." Exhibit 1, Enclosure 6. In response, by letter dated August 23, 2011, CCA stated that it "has already met the requirements for an equitable adjustment pursuant to FAR 52.222-43," that the FAR does not require it to provide the cost breakout, and that it was "unwilling to provide our cost data to ICE currently," although it might reconsider its position if ICE could explain the direct pertinence of the cost data to its claim. Exhibit 1, Enclosure 7.

On September 21, 2011, the ICE contracting officer issued a decision denying CCA's claim. Exhibit 1. He found that CCA's contract "already appears to include annual escalations of three percent (3%) to the unit/line item prices for all of the option line items," meaning that CCA "has already included adjustments for SCA wages in its option pricing." *Id.* at 4. He also stated that, although ICE was entitled to documentation supporting CCA's cost calculations under FAR 52.222-43(g) and 52.215-2, CCA had been unwilling to provide that information, requiring him to deny the claim "due to lack of records or documentation supporting entitlement." *Id.*

IV. CCA's Appeal

On December 1, 2011, CCA appealed the contracting officer's decision to the Board, where the appeal was docketed as CBCA 2647. Soon thereafter, the parties filed cross-motions for summary relief, each contending that, under the undisputed facts of record, it is entitled to judgment. After briefing was completed, the Board conducted a telephonic status conference, during which it was agreed that the parties would conduct limited discovery targeting the Government's interest in ensuring that CCA's warranty pursuant to FAR 52.222-43 was justified. Following discovery, the parties submitted supplemental briefing, after which the Board held oral argument on the pending motions.

Subsequently, ICE filed a motion seeking to strike statements from CCA's briefs indicating that ICE had agreed that discovery was complete by October 25, 2013, and that the Government had voluntarily waived its right to request cost or pricing data. In addition, after ICE supplemented the appeal file with a report from DOL about an entity with which CCA is affiliated, CCA objected to the supplement as irrelevant to the issues before the Board and prejudical to CCA. ICE's motion to strike and CCA's motion objecting to and seeking to strike the appeal file supplementation remain pending.

CCA has also filed two other appeals, challenging the contracting officer's denial of wage and benefit increases under the contract in response to additional wage determination revisions that DOL issued in 2011 and 2012. Those appeals, docketed as CBCA 3045 and 3753, are stayed, at the parties' request, pending resolution of the parties' motions for summary relief in this case.

Discussion

The Government's Jurisdictional Challenge

ICE asserts that we lack jurisdiction to entertain CCA's appeal based upon CCA's refusal to submit documents that the Government requested to assist it in analyzing the claim. ICE argues that, "[b]ecause CCA did not provide the Government with data necessary for meaningful review of its claim," CCA has "sidestep[ped] the ordinary claim process" that the Contract Disputes Act (CDA), 41 U.S.C. §§ 7101-7109 (2012), requires, which, it argues, is a necessary prerequisite to jurisdiction. Respondent's Motion for Summary Relief at 10.

"Subject matter jurisdiction is a threshold matter involving a tribunal's 'power to hear a case,' and a tribunal must dismiss a case over which it lacks jurisdiction." *McAllen Hospitals LP v. Department of Veterans Affairs*, CBCA 2774, et al., 14-1 BCA ¶ 35,758, at 174,970 (quoting *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 514 (2006)). Under the CDA, the Board has "jurisdiction to decide any appeal from a decision of a contracting officer of" particular executive agencies, including ICE, "relative to a contract made by that agency." 41 U.S.C. § 7105(e)(1)(B). If the contracting officer's decision relates to a claim by the contractor, "[j]urisdiction requires both that a claim meeting certain requirements have been submitted to the relevant contracting officer and that the contracting officer have issued a final decision on that claim." *K-Con Building Systems, Inc. v. United States*, 778 F.3d 1000, 1005 (Fed. Cir. 2015).

"A claim is 'a written demand or written assertion by one of the contracting parties seeking, as a matter of right, the payment of money in a sum certain, the adjustment or interpretation of contract terms, or other relief arising under or relating to the contract.'"

K-Con Building Systems, 778 F.3d at 1005 (quoting *Reflectone, Inc. v. Dalton*, 60 F.3d 1572, 1575 (Fed. Cir. 1995) (en banc) (quoting regulatory language now located at 48 CFR 52.233-1(c)). The "claim need not be submitted in any particular form or use any particular wording," but "must contain 'a clear and unequivocal statement that gives the contracting officer adequate notice of the basis and amount of the claim.'" *M. Maropakis Carpentry, Inc. v. United States*, 609 F.3d 1323, 1327 (Fed. Cir. 2010) (quoting *Contract Cleaning Maintenance, Inc. v. United States*, 811 F.2d 586, 592 (Fed. Cir. 1997)). Further, "for any claim in excess of $100,000, the contractor must certify the claim." *McAllen Hospitals*, 14-1 BCA at 174,971; *see* 41 U.S.C. § 7103(b)(1); 48 CFR 52.233-1(c). CCA's claim satisfies these requirements. It provided an adequate statement of the amount sought and an adequate statement of the basis for the request. Further, CCA filed its appeal within ninety days of its receipt of the contracting officer's decision, satisfying the CDA's appeal deadline. *See* 41 U.S.C. § 7104(a) (2012). Accordingly, we possess jurisdiction to entertain CCA's appeal.

Although ICE seeks to add a jurisdictional requirement that the contractor's claim be supported by adequate documentation, that argument is unavailing under the Court of Appeals for the Federal Circuit's decision in *H.L. Smith, Inc. v. Dalton*, 49 F.3d 1563 (Fed. Cir. 1995). In that case, the Federal Circuit reversed the Armed Services Board of Contract Appeals' dismissal of an appeal for lack of jurisdiction arising out of the contractor's inadequate documentary support for its claim, holding that "[i]nvoices, detailed cost breakdowns, and other supporting financial documentation need not accompany a CDA claim as a jurisdictional prerequisite." *Id.* at 1566; *see Thomas Creek Lumber & Log Co.*, IBCA 4020-1999, 00-2 BCA ¶ 31,077, at 153,434-35 (applying *H.L. Smith*); *Information Handling Services, Inc. v. General Services Administration*, GSBCA 14318, et al., 98-1 BCA ¶ 29,620, at 146,791 (same). For the same reasons, ICE has no basis for imposing a documentation requirement upon CCA as a jurisdictional prerequisite to appeal. The agency seeks to impose a jurisdictional requirement not found in statute. Because we review a contracting officer's decision *de novo*, any findings by the contracting officer that a claim lacks sufficient support are not binding in a proceeding before the Board. *See Wilner v. United States*, 24 F.3d 1397, 1401-02 (Fed. Cir. 1994) (en banc); *see also Harney County Gypsum Co.*, AGBCA 93-190-1, 94-1 BCA ¶ 26,455, at 131,643 (1993) ("a [contracting officer's] findings of fact are not binding in any subsequent proceeding"). We deny ICE's motion to dismiss for lack of jurisdiction.

The Merits

I. Standard of Review

"Resolving a dispute on a motion for summary relief is appropriate when the moving party is entitled to judgment as a matter of law, based on undisputed material facts." *Au'*

Authum Ki, Inc. v. Department of Energy, CBCA 2505, 14-1 BCA ¶ 35,727, at 174,891. "The moving party bears the burden of demonstrating the absence of genuine issues of material fact," and "[a]ll justifiable inferences must be drawn in favor of the nonmovant." *Id.* Nevertheless, to preclude entry of summary relief, "the party opposing summary judgment 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). "Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." *Navigant SatoTravel v. General Services Administration*, CBCA 449, 08-1 BCA ¶ 33,821, at 167,403 (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)).

The matter is submitted not on the record by either party under CBCA Rule 19, but on cross-motions for summary relief. Thus, the non-moving party benefits by factual presumptions being made in its favor for facts disputed on the existing record. *Acquest Government Holdings U.S. Geological, LLC v. General Services Administration*, CBCA 439, 07-1 BCA ¶ 33,576, at 166,336. "The mere fact that both parties have filed motions for summary relief does not warrant the granting of summary relief unless one of the moving parties proves that it is entitled to judgment as a matter of law upon facts that are not genuinely disputed." *Id.*

II. The Purpose of the Warranty Under the FLSA/SCA Price Adjustment Clause

"The SCA requires most government service contracts to contain clauses that protect workers' wages and fringe benefits." *Lear Siegler Services, Inc. v. Rumsfeld*, 457 F.3d 1262, 1266 (Fed. Cir. 2006) (citing statutory provision now located at 41 U.S.C. § 6703). It "directs the Secretary of Labor . . . to issue special minimum wage orders, called 'wage determinations,' for each class of service worker employed in a particular locality, and it forbids contractors (that is, employers) from paying less than the Secretary's wage determinations." *Id.* (citing statutory provision now located at 41 U.S.C. § 6703(1)). Those wage determinations are incorporated into the contract. *Government Contracting Resources, Inc.*, ASBCA 59162, 15-1 BCA ¶ 35,916, at 175,575 (citing 48 CFR 52.222-41(c)).

To account for any revised wage determinations that DOL may issue during the contract performance period, government services contracts must also include the FLSA/SCA Price Adjustment clause, "which provides an adjustment for increased costs resulting from 'the Department of Labor determination of minimum prevailing wages and fringe benefits applicable at the beginning of the renewal option period.'" *United States v. Service Ventures, Inc.*, 899 F.2d 1, 3 (Fed. Cir. 1990). Absent the Price Adjustment clause, which is incorporated by reference into CCA's contract, offerors seeking a contract award would have to include, "in estimating [their] price or discount terms" when bidding, "an

amount covering possible wage increases foreseeable in the light of the contract option provisions and the likelihood of increased wages due to inflation." *Jets Services, Inc.*, ASBCA 19070, 74-2 BCA ¶ 10,649, at 50,558. However, the FLSA/SCA Price Adjustment clause requires the contractor to base its option-year prices on the wage determination incorporated into the contract, to exclude possible future increases for labor costs covered by the SCA from its option-year prices, and to warrant at the time of contract award "that its proposed price [does] not include any contingency for such possible wage increases." *Id.* "In exchange for that warranty, [the contractor is] entitled to recover the amount of wage increases and related fringe benefits, taxes, and insurance as required from time to time" when DOL issues revised wage determinations that the contractor is required to pay its employees performing work under the contract. *Id.* Under the Price Adjustment clause, "the applicable DOL wage determination applies to the contract at the beginning of each renewal period, and the contract's price will be adjusted when the contractor has to increase what it pays to comply with that determination." *Government Contracting Resources*, 15-1 BCA at 175,576.

"[T]he *quid pro quo* for the warranty made by [the contractor] under" the Price Adjustment clause is "a guarantee that [the contractor will] recover its direct cost increases flowing from a revised wage determination." *Jets Services*, 74-2 BCA at 50,558. As part of that *quid pro quo*, however, the contractor is "prohibited, by [the warranty provision] of the FLSA clause, from including [in its option-year contract pricing] contingency costs that would be covered in a price adjustment for the renewal option year pursuant to the FLSA clause." *Service Ventures*, 899 F.2d at 3. "The underlying purpose of the clause is essentially to eliminate the possibility of contractors overestimating future labor rate increases in order to protect themselves and thereby unnecessarily increasing government contract costs." *IBI Security Service, Inc.*, 69 Comp. Gen. 707, 710 (1990).

III. Whether the Warranty Constitutes a Condition Precedent

In this appeal, the Government claims not only that CCA's warranty is untrue, but that the honesty and truthfulness of CCA's warranty is a condition precedent to ICE's obligation to pay CCA's claims arising under increased wage determinations. Because the warranty is untrue, says the Government, CCA did not satisfy its condition precedent to any SCA wage increase, excusing ICE from making the increase.

The importance to the Government's case of characterizing CCA's warranty as a "condition precedent," rather than as a breach of a promise, is in the allocation of the burden of proof. Generally, the party alleging a breach of a contractual promise bears the burden of proving that breach. *Stockton East Water District v. United States*, 583 F.3d 1344, 1360 (Fed. Cir. 2009). That party, in this case, is the Government. However, the burden of

proving that a condition precedent has been satisfied falls on the party that is responsible for performing the precedent condition. *See, e.g.*, *Mullins v. TestAmerica, Inc.*, 564 F.3d 386, 412-13 (5th Cir. 2009) (party seeking to recover under a contract bears the burden of proving satisfaction of all conditions precedent); *Asia Media Corp.*, ASBCA 44452, 96-1 BCA ¶ 28,179, at 140,666 (same); 13 Samuel Williston & Richard A. Lord, *A Treatise on the Law of Contracts* § 38:26, at 554 (4th ed. 2013) (ultimate burden of proof with regard to conditions precedent remains on plaintiff). ICE argues that, because the truth of CCA's warranty is a condition precedent to ICE's obligation to pay increased DOL wage determinations, CCA has the burden of proving the accuracy of its warranty.

"[I]f a contractual duty is subject to a condition *precedent*, that condition must be satisfied *before* the duty" to provide responsive performance ever arises. *Landmark Land Co. v. Federal Deposit Insurance Corp.*, 256 F.3d 1365, 1376 (Fed. Cir. 2001) (italics in original);[3] *see Essen Mall Properties, Inc. v. United States*, 21 Cl. Ct. 430, 441 (1990) ("Performance of a duty subject to a condition cannot become due unless the condition occurs or its non-occurrence is excused." (quoting Restatement (Second) of Contracts § 225(1) (1981)). "Only contingent events constitute conditions precedent, since it is the essence of such a condition that it qualify the promisor's obligation in such a way that if it fails to happen the promisor is discharged." Laurence P. Simpson, *Contracts* § 144, at 300-01 (2d ed. 1965).

The law distinguishes a contracting party's failure to perform a condition from a party's breach of a contractual duty or promise. A promise is "an expression of *commitment* to act in a specified way, or to bring about a specified result in the future, or to take responsibility that the result has occurred or will occur, communicated in such a way that the addressee of the expression may justly expect performance and may reasonably rely thereon." 1 Joseph M. Perillo, *Corbin on Contracts* § 1.13, at 35 (rev. ed. 1993) (emphasis added); *see* Restatement (Second) of Contracts § 2(1) ("promise is a manifestation of intention to act or refrain from acting in a specified way, so made as to justify a promisee in understanding that a *commitment* has been made" (emphasis added)). "If the term is a *promise* on the part of the other party, its failure to happen is a breach of contract, for which compensation in damages is allowed." Simpson, *supra*, § 146, at 305 (emphasis added). Conversely, if a

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[3] Because of the confusion sometimes engendered by the distinctions between conditions precedent and conditions subsequent, the American Law Institute prefers the more generic term "conditions." Restatement (Second) of Contracts § 224 note (1981). Because courts and boards, including the Court of Appeals for the Federal Circuit, routinely use both the terms "condition" and "condition precedent" in published decisions, we use those terms interchangeably here.

contracting party fails to satisfy a *condition*, it does not subject that party to financial liability, but merely excuses the other party from performing return duties. *Id.*

Because "[a] fact or event may be made a condition of a contract right and duty by any form of words capable of interpretation," 8 Catherine M.A. McCauliff, *Corbin on Contracts* § 31.1, at 41 (rev. ed. 1999), "[t]he determination of whether a contract term is a promise or a condition is a problem of interpretation." *In re Columbia Gas System Inc.*, 50 F.3d 233, 241 (3d Cir. 1995) (citing 2 E. Allen Farnsworth, *Farnsworth on Contracts* § 8.4, at 366 (1990)); *see* Restatement (Second) of Contracts § 226 cmt. a (1981) ("Whether the parties have, by their agreement, made an event a condition is determined by the process of interpretation."). Interpretation of a contract is a question of law, based upon the plain meaning of the contract language. *National Housing Group, Inc. v. Department of Housing & Urban Development*, CBCA 340, et al., 09-1 BCA ¶ 34,043, at 168,377.

Here, the contract language makes clear that CCA's warranty is not a condition precedent, but a promise by CCA – made as a part of the contract award process itself – that CCA had not escalated labor costs subject to the SCA. We reach this conclusion for the following reasons:

First, the alleged "condition" is not an uncertain future event that might (or might not) occur at some point after contract execution, but involves an act that CCA represented was already completed as part of its contract execution. Although it is possible to write a contract to make a past or present event a condition to the other party's performance obligation, *see* Restatement (Second) of Contracts § 224 cmt. b (1981), conditions precedent typically "are those facts and events, *occurring subsequently to the making of a valid contract*, that must exist or occur before there is a right to immediate performance, before there is a breach of contract duty, before the usual judicial remedies are available." 3A Arthur Corbin, *Corbin on Contracts* § 638, at 16 (1960) (emphasis added). Further, a condition involves an event that is "*not certain to occur*, which must occur . . . before performance under a contract becomes due." Restatement (Second) of Contracts § 224 (1981) (emphasis added). Here, there is no uncertainty in the happening of a future event: CCA promised in the contract itself that, in its contract pricing, it had not escalated its labor prices. That was a promise as to a fact that occurred prior to or as part of the contract award, not a predictor of a future and uncertain event.

Second, CCA was in control of whether its representation was true. "[W]here the conditioning event is within the control of the promisor," he "is regarded as having impliedly promised that the condition shall happen within a reasonable time." Simpson, *supra*, § 146, at 306; *see* 13 Williston & Lord, *supra*, § 38:15, at 481-82 ("the more control one party has over whether the condition will occur, the more likely a promise [rather than a condition

precedent] will be implied"). "[W]hen the conditioning event is solely within the power or control of one party, it is both appropriate and fair to imply such a promise." 13 Williston & Lord, *supra*, § 38:15, at 482. Here, CCA was in complete control of whether its labor prices were, or were not, escalated, indicating a promise rather than a condition precedent.

Third, and most importantly, for an action to constitute a condition precedent, the language of the contract itself must clearly evidence the conditional nature of the promisee's responsive obligation, which it does not here. "No particular form of language is necessary to make an event a condition, although such words as 'on condition that,' 'provided that' and 'if' are often used for this purpose." *Korea Development Corp. v. United States*, 9 Cl. Ct. 167, 176 (1985) (quoting Restatement (Second) of Contracts § 226 cmt. a (1981)); *see* Simpson, *supra*, § 146, at 305 ("[w]ords clearly of condition are 'if', 'on condition that', 'provided', and the like," as well as "promises to perform 'when', 'after', 'as soon as', or 'upon' the happening of a stated event"). The absence of such words "suggests that the parties intended a promise, rather than a condition." 13 Williston & Lord, *supra*, § 38:16, at 498; *see Bulgartabac Holding AD v. Republic of Iraq*, 451 F. App'x 9, 11 (2d Cir. 2011) (absence of typical conditional language is probative of a promise). Here, the language of neither CCA's warranty nor the Government's wage adjustment obligation includes any of the qualifications that typically accompany a condition precedent: that is, the contract language does not state that, *if* CCA has not escalated its prices to account for future contingencies or *to the extent that* CCA has not included such escalations, *then* the Government will approve price adjustments in response to future DOL wage determinations. Instead, in its contract, CCA expressly "warrants that the prices in this contract do not include any allowance for any contingency to cover increased costs for which adjustment is provided" under 48 CFR 52.222-43(b). Although, based upon this warranty, ICE was to approve substantiated requests for contract price increases in response to future DOL increased wage determinations, *see* 48 CFR 52.222-43(d), the fact that the warranty creates a responsive duty in ICE does not render the truthfulness of the warranty conditional in nature. CCA makes an affirmative representation – in the form of a promise, a commitment, a guarantee – that its contract prices do not include allowances for contingencies. It is CCA's alleged breach of this promise, rather than CCA's failure to satisfy a condition precedent, that gives rise to ICE's challenge to CCA's contract price increase request.

ICE argues that the use of the word "warrant," in and of itself, indicates that the truthfulness of the promise is a condition precedent, without the need for words like "if" or "after," citing to the Supreme Court's decision in *Langley v. Federal Deposit Insurance Corp.*, 484 U.S. 86 (1987). *See* Respondent's Motion at 19. ICE is overstating the meaning of *Langley*, which held only that the truthfulness of the express warranty was, under the statutory scheme at issue there, a condition precedent to recognition of an agreement. The Court did not issue a sweeping holding that every warranty in a contract automatically

constitutes a condition, without regard to the language used or the contractual circumstances. To the contrary, the general definition of the verb "warrant" is "[t]o promise or guarantee," *Black's Law Dictionary* 1820 (10th ed. 2014), which does not infer a condition. Further, in other contexts, a warranty is viewed as an affirmative promise, or "an assurance by one party to an agreement of the existence of a fact upon which the other party may rely . . . intended precisely to relieve the promisee of any duty to ascertain the facts for himself." *Oman-Fischbach International (JV) v. Pirie*, 276 F.3d 1380, 1383 (Fed. Cir. 2002) (quoting *Dale Construction Co. v. United States*, 168 Ct. Cl. 692, 699 (1964)). Although a warranty may sometimes appear similar to a condition, there is a "manifest distinction" between the two:

> While a warranty is similar to a condition precedent in the respect that it must be true to avoid a defense on the ground of its breach, it lacks an essential element of a condition precedent in that it contains no stipulation that an event shall happen or an act be done after the contract is made and before obligation shall arise thereunder. A condition precedent . . . is a condition without performance of which the contract, though in form executed by the parties and delivered, does not spring into life to the extent that [the condition does not happen]; whereas a warranty does not suspend or defeat the operation of the contract, but a breach affords either the remedy provided in the contract or that furnished by the law.

Hurt v. New York Life Insurance Co., 53 F.2d 453, 454 (10th Cir. 1931). Here, the mere use of the word "warrant" does not create a condition precedent, particularly in light of the language of the contract.[4]

ICE also argues that, despite the absence of conditional language in CCA's warranty, the board in *Transcontinental Cleaning Co.*, NASA BCA 1075-9, 78-1 BCA ¶ 13,081 (1977), effectively held that the warranty in the predecessor to FAR 52.222-43(b), which contains essentially the same language as that at issue here, is a condition precedent because

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[4] If there were any ambiguity in the language, which there is not, we would still reject ICE's position. Because the law does not favor conditions precedent, a tribunal will not interpret a contract as containing a condition unless required by plain and unambiguous language. *Washington Development Group-JWB, LLC v. General Services Administration*, GSBCA 15137, et al., 03-2 BCA ¶ 32,319, at 159,887 n.7. If any ambiguity exists, the law favors interpreting it as a promise. *See, e.g.*, *DuVal Wiedmann, LLC v. InfoRocket.com, Inc.*, 620 F.3d 496, 502 (5th Cir. 2010); *Ginett v. Computer Task Group, Inc.*, 962 F.2d 1085, 1099-100 (2d Cir. 1992); *Intelsat USA Sales LLC v. Juch-Tech, Inc.*, No. 10-2095, 2014 WL 2930679 (D.D.C. June 30, 2014).

it placed on the contractor the obligation to prove the truth of its warranty before the Government was required to pay increased wages resulting from a new wage determination. Respondent's Motion at 23. In that case, though, the contract, as originally awarded, did not contain the FLSA/SCA Price Adjustment clause and the contractor, therefore, did not originally warrant that it had not escalated its future year labor costs. *Id.* at 63,894. After the clause was read into the contract during contract performance pursuant to the doctrine enunciated in *G.L. Christian & Associates v. United States*, 320 F.2d 345 (Ct. Cl. 1963), the board placed the burden on the contractor seeking a wage increase to establish that, despite the absence of a warranty at the time of contract award, it had not escalated its labor prices. *Transcontinental Cleaning*, 78-1 BCA at 63,899. The burden of proof, therefore, was placed on the contractor only because it had made no promise or warranty at the time of contract award, not because a warranty actually given at contract award constituted a condition precedent. *See id.*; *see also Telesec Library Services*, ASBCA 42968, 92-1 BCA ¶ 24,650, at 122,987 (1991) (placing burden on contractor of proving that it did not escalate later-year labor prices where, because FLSA/SCA Price Adjustment clause was not originally included in contract, contractor did not warrant absence of escalation at time of contract award).

CCA's warranty was a promise, not a condition precedent. Accordingly, ICE bears the burden of proving that CCA breached its promise.

IV. CCA's Refusal to Provide Documentation

Although CCA correctly argues that it is the Government's burden to establish that CCA breached the promise in its warranty, CCA simultaneously has acted to preclude the Government from accessing information that would assist the Government in meeting that burden or would allow it to verify the veracity of CCA's promise. From the beginning of the parties' dispute, ICE has attempted to access "data reflecting CCA's original calculation of contract prices and escalation rates, *i.e.*, data 'used in the award of [the contract],'" Respondent's Reply at 3 (quoting Exhibit 13 at 2), to allow it to evaluate that veracity. As support for its right to access such records, ICE has consistently cited to paragraph (g) of the FLSA/SCA Price Adjustment clause, which expressly grants the ICE contracting officer a contractual right to "have access to and the right to examine any directly pertinent books, documents, papers and records of the Contractor until the expiration of 3 years after final payment under the Contract." 48 CFR 52.222-43(g). CCA has repeatedly denied ICE that access, asserting that the words "directly pertinent" in the clause provide the Government with very narrow record access rights and that the only "directly pertinent" information to the matters identified in FAR 52.222-43 is documentation showing the wages that CCA originally paid at contract award and the wages that it subsequently paid following the 2010 wage determination.

After the parties filed their summary relief briefing, the Board ordered that CCA permit ICE to take discovery relating to CCA's warranty. After discovery, the parties filed supplemental briefing addressing the information gleaned through that process. Because "appellants in CDA cases are not barred from submitting documentary evidence to the Board in support of their appeals simply because they did not originally present that evidence to the [contracting officer]," *McAllen Hospitals*, 14-1 BCA at 174,977 n.10, and because ICE now has and can rely in this proceeding upon the information that it sought through FAR 52.222-43(g), the defect about which ICE complains has effectively been remedied, making is unnecessary to decide the scope of FAR 52.222-43(g) at this time.[5]

V. The Parties' Motions Regarding the Contents of the Record

ICE has filed a motion to strike from the record two statements that CCA made in its supplemental briefing: (1) that, "[o]n October 25, 2013, the parties reported to the Board that discovery had been completed," and (2) that, during a prior status conference with the Board, the Government voluntarily waived its right to access cost or pricing data from CCA. ICE asserts that these statements "are factually incorrect and therefore unduly prejudicial to the Government," although it does not now dispute that it has obtained its discovery. Respondent's Motion to Strike at 1. None of the Board's rulings in this decision are based upon the challenged representations. Further, ICE has fully and thoroughly explained its objections to and disagreements with CCA's representations in its motion to strike and its reply briefing on the motion to strike. If the material to which a party objects "has been explained fully in the parties' briefing," it "creates no prejudice or confusion," leaving no need to strike it from the record. *Impresa Construzioni Geom. Domenico Garufi v. United States*, 61 Fed. Cl. 175, 177 (2004). There is no need to strike these statements from the record.

For its part, CCA objects to ICE's submission after the completion of supplemental briefing of an appeal file supplement under CBCA Rule 4, 48 CFR 6101.4 (2014). CCA asserts that the submitted document, an investigation report from DOL dealing not with CCA but with a company with which CCA has an affiliation, is irrelevant to this appeal and prejudicial to CCA. CBCA Rule 4 requires the Government to submit "appeal file exhibits consisting of all documents and other tangible things relevant to the claim and to the contracting officer's decision which has been appealed." *Id.* Although the agency must have

[5] For the same reason, we need not address ICE's argument that it was entitled to obtain documents from CCA pursuant to the audit provision at FAR 52.215-2(f) or CCA's argument that ICE abandoned that argument. Discovery in this appeal has rendered those arguments moot.

some discretion in compiling the appeal file, we have difficulty seeing how comments about another entity have any bearing upon whether CCA escalated SCA-related labor costs in its offer. Nevertheless, ICE asserts that the document might have some relevance to quantum, and, at this stage of proceedings, we are hesitant to strike a document from the appeal file purportedly dealing with quantum before we know the parties' arguments about quantum. Although we have the authority to strike from consideration "evidence which is not relevant," *Freeman-Darling, Inc.*, GSBCA 7112, 85-1 BCA ¶ 17,751, at 88,639 (1984), we overrule CCA's objection to the supplemental appeal file submission at this stage of proceedings, subject to ICE's obligation "to weave the thread of relevancy at [any future hearing], and if it does not do so, the motion to strike [can] thereafter be renewed." *Consolidated Marketing Network, Inc.*, DOT CAB 1680, et al., 86-1 BCA ¶ 18,567, at 93,237. Nevertheless, we have not considered the cited investigation report in evaluating the parties' pending motions for summary relief.

VI. The Effect of CCA's Option Year CLIN Price Escalations

Having dealt with the parties' preliminary arguments, we reach the heart of CCA's case: its challenge to ICE's refusal to adjust prices and make payments under Option Year II pursuant to the FLSA/SCA Price Adjustment clause in response to the 2010 Wage Determination. CCA disputes ICE's determination that CCA, contrary to CCA's warranty under FAR 52.222-43(b), had escalated its SCA-related labor costs and benefits in its option year CLINs.

CCA first appears to argue that its mere act of providing a warranty constitutes irrebutable proof that it did not escalate its option-year SCA-related costs – that is, if a contractor provides a warranty, the Government can never question it. Interpreting FAR 52.222-43(b) as creating such an irrebuttable presumption would effectively insulate the contractor's warranty from any kind of verification or challenge, "even in instances where the contracting officer had knowledge or reason to know of negligent or deliberate misstatements." *Automated Business Systems & Services, Inc.*, GSBCA 9213-P, et al., 88-1 BCA ¶ 20,323, at 102,748 (1987) (discussing contracting officer's right to question "Buy American Act" certification). Courts have held that "[a]n irrebuttable presumption of fact violates due process." *Universal Restoration, Inc. v. United States*, 798 F.2d 1400, 1406 (Fed. Cir. 1986); *see R.H. Stearns Co. of Boston, Mass. v. United States*, 291 U.S. 54, 63 (1934) (even "the presumption of regularity" by Government officials "is subject to be rebutted"). Although, to prevail on its theory, the Government has the ultimate burden of proving that CCA's warranty is untrue, CCA cannot merely rely upon the fact of warranty

in response to Government-presented evidence that the promise in the warranty was not true. The Government is entitled to challenge the warranty's veracity.[6]

Each party then argues that it is entitled to summary relief because it has presented undisputed factual evidence showing that CCA's option-year pricing escalates, or does not escalate, SCA costs. Both the Government and CCA agree that, for each option year CLIN in its contract, CCA added a three-percent annual price escalation to the total price of that CLIN from the prior year's price. *See, e.g.*, Affidavit of Lucibeth Mayberry ¶ 4 (CCA's contract contains "a 3% annual escalator for each of the option years under the contract"); Appellant's Response Brief at 12 ("the Contract price is increased by a fixed three percent (3%) for each option year"). They also agree that, even though CCA could have done so, CCA did not isolate its non-SCA costs in each option year CLIN and apply a three-percent escalation factor only to those non-SCA costs. *See* Transcript at 22-23. Instead, as the parties agree, CCA "increased the amount of [each option year] CLIN in general," *id.* at 18, applying the three-percent escalation to the "bottom line number" of each CLIN, *id.* at 39, without regard to the costs contained within that CLIN.

Each party argues that these facts support its position on whether CCA option-year prices include any allowance for any contingency to cover increased costs for which the FLSA/SCA Price Adjustment clause provides an adjustment. The Government, in further support of its position, cites to CCA's own admissions as to the manner in which CCA created and applied its price escalation, the pricing structure of CCA's contract (evidenced from the contract itself), and a declaration about the relevance of SCA-related costs to CCA's escalation, based upon the declarant's knowledge of the work required under each CLIN. CCA, in further support of its position, relies upon declarations from Lucibeth Mayberry,

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[6] Contrary to CCA's argument, the board in *JDD, Inc.*, ASBCA 55282, 06-2 BCA ¶ 33,345, did not indicate that the contractor's mere giving of a warranty insulates that warranty from challenge or constitutes conclusive evidence of its truth. Although the board in *JDD* did not expressly state whether the Government affirmatively contested the veracity of the contractor's warranty in that case, such a challenge seems unlikely. The Government there argued that, because offerors were instructed during the procurement process to include anticipated future labor price increases in their contract pricing despite the FLSA/SCA Price Adjustment clause, the eventual awardee was barred from obtaining any such increases after award. *Id.* at 165,346. Accordingly, the veracity of the warranty was irrelevant to the Government's argument in that case. In any event, the board affirmatively found that, "[a]pparently, JDD did not escalate its proposed prices." *Id.* at 165,345. The board in *JDD* did not hold that the Government can never challenge the veracity of a contractor's FAR 52.222-43(b) warranty.

CCA's Vice President and Deputy Chief Development Officer, in which she attests that the across-the-board price escalation was intended to address anticipated inflation in non-SCA costs and not to preclude contract price increases in response to DOL wage determinations, and from Patrick Swindle, its Vice President and Treasurer, in which he attests that the "amount of escalation is simply a mathematical expression of the risk level acceptable to CCA."

After thoroughly reviewing the parties' submissions, the Board believes that, in light of the presumptions that we must make in favor of the non-moving party when reviewing each party's summary relief motion, further development of the record would assist the Board in evaluating the merits of the parties' positions. A trial tribunal, when considering motions for summary relief, "performs what amounts to what may be called a negative discretionary function." *Ehlers-Noll, GmbH v. United States*, 34 Fed. Cl. 494, 499 (1995) (quoting *McLain v. Meier*, 612 F.2d 349, 356 (8th Cir. 1979)). Although the tribunal "has no discretion to *grant* a motion for summary judgment" if there are genuine disputes of material fact, *id.* (quoting *McLain*, 612 F.2d at 356), it "has the right to exercise its discretion to *deny* a motion for summary judgment, even if it determines that a party is entitled to it if in the [tribunal's] opinion, the case would benefit from a full hearing." *SunTiger, Inc. v. Scientific Research Funding Group*, 189 F.3d 1327, 1333 (Fed. Cir. 1999) (quoting 12 James W. Moore, *Moore's Federal Practice* § 56.41[3][d] (3d ed. 1999)) (emphasis added); *see Confederated Tribes of Colville Reservation v. United States*, 964 F.2d 1102, 1109 (Fed. Cir. 1992) ("courts have discretion to deny summary judgment on issues in which it might otherwise be appropriate"); *Ehlers-Noll*, 34 Fed. Cl. at 499 ("even if the [tribunal] is convinced that the moving party is entitled to [summary] judgment the exercise of sound judicial discretion may dictate that the motion should be denied, and the case fully developed" (quoting *McLain*, 612 F.2d at 356)). In light of the nature of the parties' evidence, including rather conclusory representations as to the circumstances under which CCA escalated option-year prices when making its warranty, a more complete record should better enable the Board to make appropriate factual findings and reach necessary legal determinations.

In addition to addressing the factual circumstances underlying CCA's warranty, the parties should also be prepared to address in further proceedings CCA's position that the parties' prior course of dealing establishes a mutual understanding that the flat three-percent escalation rate was acceptable under the current contract. CCA held the predecessor to the current contract, a contact in which it included the same type of across-the-board three-percent option-year price escalations that it included in this contract. As it did for the current contract, CCA warranted, pursuant to FAR 52.222-43(b), that its option-year pricing in the predecessor contract did not include any contingencies for increased future SCA costs. In response to DOL wage determinations, ICE issued three separate contract modifications

under the predecessor contract, each one increasing the contract price in an amount correlating to an increased wage determination, and it never complained about the manner in which CCA had escalated its option-year prices. The agency even granted one such price increase in response to a new wage determination under the current contract, again without complaint about CCA's pricing structure. CCA has argued that this past course of dealing is relevant in showing that the parties mutually agreed that CCA's method of option-year price escalation was acceptable. Appellant's Supplemental Brief at 12. Although the past conduct may be relevant to CCA's own understandings and interpretations, CCA goes further by asking the Board to draw conclusions with respect to ICE's understandings.

"[A] course of dealing can supply an enforceable term to a contract (or may even supplement or qualify that contract) provided that the conduct which identifies that course of dealing can reasonably be construed as indicative of the parties' intentions – a reflection of their joint or *common* understanding." *Sperry Flight Systems Division of Sperry Rand Corp. v. United States*, 548 F.2d 915, 923 (Ct. Cl. 1977) (italics in original). "It may also establish that a contract requirement has effectively been waived: 'A contract requirement for the benefit of a party becomes dead if that party knowingly fails to exact its performance, over such an extended period, that the other side reasonably believes the requirement to be dead.'" *Products Engineering Corp. v. General Services Administration*, GSBCA 12503, 96-2 BCA ¶ 28,305, at 141,332 (quoting *Gresham & Co. v. United States*, 470 F.2d 542, 554 (Ct. Cl. 1972)).

CCA complains that ICE's past behavior lulled it into believing that its price escalation method satisfied ICE, and it may seem somewhat unfair to fault CCA, and limit contract price increases for the current contract's second option year and beyond, in light of ICE's failure to object to CCA's method of option-year price escalation on the predecessor contract or for the first option year on this contract. Nevertheless, the record is less than clear as to whether ICE actually recognized the methodology by which CCA had escalated its option-year prices before it approved any prior wage determination price increases. "Establishing a course of dealing requires a reflection of a joint or common basis of understanding held by both parties" – that is, actual knowledge by both parties. *United Computer Supplies, Inc. v. United States*, 43 Fed. Cl. 351, 358 (1999); *see General Engineering & Machine Works*, ASBCA 38788, 92-3 BCA ¶ 25,055, at 124,871 ("In order for a contractor to successfully rely upon a prior course of dealing, it must establish that both parties had actual knowledge of that prior conduct and of the manner in which it affected contract performance."). Because "[t]he government had every right to rely on [CCA's] express warranty" and to "tak[e] the seller at his word," *United States v. Franklin Steel Products, Inc.*, 482 F.2d 400, 403 n.4 (9th Cir. 1973), ICE had no obligation affirmatively to investigate CCA's warranty before approving prior price increases, and CCA cannot rely upon those approvals as constituting a prior course of dealing that establishes the parties'

agreement about, or waives any deficiencies in, its warranty unless the Government understood what CCA had done. *See id.* ("While the government may have been 'contributorily negligent' in not [initially] conducting a more thorough [evaluation], that is not a defense to a breach of warranty claim."). The record here is very sparse in terms of whether the contracting officer for the predecessor contract actually recognized, in fact or even by implication, that CCA's option-year prices contained a three-percent across-the-board escalation. During further proceedings, the parties should more fully develop the record relating to that knowledge issue.

Decision

For the foregoing reasons, we **DENY** the Government's motion to dismiss this appeal for lack of jurisdiction. We **DENY** the Government's motion to strike two CCA statements from the record. We **DENY** CCA's motion to strike the Government's supplemental appeal file submission, without prejudice to CCA's right to renew its objection at a future date. We **DENY** the parties' cross-motions for summary relief. The Board will schedule further proceedings by separate order.

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HAROLD D. LESTER, JR.
Board Judge

We concur:

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JERI KAYLENE SOMERS
Board Judge

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JOSEPH A. VERGILIO
Board Judge