UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

CBCA 3655, 3666 GRANTED IN PART;
CBCA 3658, 3660, 3661, 3662, 3663 DENIED: September 27, 2016

DOUGLAS P. FLEMING, LLC,

Appellant,

v.

DEPARTMENT OF VETERANS AFFAIRS,

Respondent.

Fred A. Mendicino and Dylan M. Marck of Faughnan Mendicino PLLC, Dulles, VA, counsel for Appellant.

David W. Altieri, Office of Regional Counsel, Department of Veterans Affairs, Syracuse, NY, counsel for Respondent.

Before Board Judges **VERGILIO**, **SHERIDAN**, and **ZISCHKAU**.

SHERIDAN, Board Judge.

These disputes involve claims in which appellant, Douglas P. Fleming, LLC (DPF), asserts that respondent, the Department of Veterans Affairs (VA), required it to perform work beyond the scope of its contract. The contract was referred to as the "2D Halls and Walls Project" and was performed at the VA Medical Center, Washington, D.C. (Washington VAMC). DPF filed several claims which the contracting officer denied. At the start of the hearing, DPF withdrew CBCA 3656, 3657, 3659, 3664, and 3665, leaving seven claims currently before the Board, CBCA 3655, 3658, 3660, 3661, 3662, 3663, and 3666. The first group of cases was dismissed by order dated August 31, 2016. In this decision, we address the second group of cases.

In CBCA 3655, DPC seeks payment for moving furniture. DPC alleges that the VA issued an "unnecessary and overly restrictive cure notice" in CBCA 3658, and seeks costs associated with its response to the cure notice. CBCA 3660 concerns additional compensation DPC seeks for painting allegedly beyond the scope of the contract. DPF seeks extra costs it claims it incurred associated with the VA's delay in issuing the notice to

proceed in CBCA 3661, performing extra work out of the contract scope and other delays in CBCA 3662, extra work directives by the VA in CBCA 3663, and the contract balance and costs associated with idle time in CBCA 3666. In total, DPF seeks $701,597.15.

Findings of Facts

1. Chronological Facts

On May 11, 2012, the VA issued solicitation number VA245-12-B-0206 for a firm, fixed price contract to furnish labor, tools, materials, equipment, and supplies to complete project 688-12-012 requiring the contractor to, among other things, patch and paint the halls and walls of ward 2D in the Washington VAMC. Appeal File, Exhibit 1.[1] The solicitation stated that the ward 2D area was approximately 16,800 square feet. *Id*. at 4; *see also* Transcript, Vol. III at 97, 188. The work in ward 2D was to be performed while the ward was active and operational. That is, patients were occupying the ward; rooms and spaces were released for work based on patient care requirements, e.g,, when the VA decided a patient could or should be moved. Patient rooms were typically released two at a time adjacent to each other. Transcript, Vol. I at 76, Vol. III at 187.

The selected contractor was to "prepare site for building operations, including demolition and removal of existing structures, and furnish labor and materials and perform work for [2D] Halls & Walls as required by drawings and specifications." Exhibit 1 at 57. The General Requirements specified that the selected contractor was to:

> [P]rovide all supervision, labor, materials and equipment to perform the tasks for 2D Halls and Walls listed below:
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> *2D (16,800 sq*ft)*[2]
> - Patch/Paint for removed Room ID signs (76 door signs 12" x 12")
> - Replace Damaged 2' x 2' Acoustic Ceiling Tiles (NTE [not to exceed] 200, VA will provide to ensure they match)
> - Replace Bumper Guards/Corner Guards in patient corridors in 2D (All in the corridors, 400' x 40')
> - *Remove wall covering in patient corridors and Patch and Paint patient corridors*

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

[2] The inclusion of the asterisk was not explained.

- *Remove wall covering in main corridor leading to 2D wing, patch and paint corridor*
- *Replace floor tiles in patient corridors and the main corridor leading to 2D wing*
- Remove 2' x 2' lighting and replace with 2' x 2' Recessed Direct/Indirect Fluorescent fixture, electronic ballast for 2 ballasts (double switching) Lithonia Type
- *Remove wall covering in patient rooms and Patch and Paint patient rooms*
- *Replace floor tiles in patient rooms in 2D wing with wood looking flooring*
- Redesign nurse work station
- Rebuild nurse work station

Exhibit 1 at 57 (emphasis added).[3] The completion time for the work was 182 calendar days. *Id*. at 4. The solicitation's Description of Work clause duplicated the information from the General Requirements provision quoted above, but the first line included the word "approximately" next to the square footage, specifying: "2D (16,800 sq*ft approximately)." *Id*. The solicitation did not specify to what the 16,800 square feet referred, i.e., the square footage of the walls, floors, ceilings, all of these, or none of these.

Solicitation amendment A0001 was issued on May 18, 2012, asking prospective contractors to submit requests for information (RFIs), and warning that the pre-bid site visit was not mandatory, but that bidders were strongly encouraged to attend. The amendment

[3] In the "detailed requirements" portion of the specifications' General Requirements clause, additional requirements were specified. These included "Class IV Infection Control Measures (per the ICRA [Infection Control Risk Assessment] Form) shall be implemented during the project," and patching, primer, and "two or three coats" of paint were required for walls leading to the main corridor of ward 2D, as well as the main corridor walls and patient rooms. Exhibit 1 at 58. The ICRA measures required DPF to establish and maintain dust, mold, and infection preventive measures in accordance with VA guidelines. Exhibit 1 at 66. In pertinent part, this involved dampening debris and providing sealed, dust proof temporary drywall construction barriers to completely separate construction from the operational areas of the hospital in order to contain dirt, debris, and dust. *Id*. High-efficiency particulate arrestance (HEPA) filtration was required where exhaust dust might enter the breathing zone, and DPF was required to verify that construction exhaust to the exterior was not reintroduced to the hospital through intake vents or building openings. *Id*.

also addressed administrative matters not associated with these disputes. Exhibit 2.[4] DPF did not attend the pre-bid site visit. According to DPF, representatives from All American Mid-West, Inc. (All American), who Mr. Douglas Fleming, the owner of DPF, has identified as the subcontractor he expected to use to perform the contract work for DPF, did attend the pre-award site visit. Exhibit 3.

A second solicitation amendment A00002, was issued on June 5, 2012, and provided responses to ten RFIs. Exhibit 4. RFI questions 8 and 9 and the VA's answers were:

> 8. Due to the fact that the site visit was rushed and no accurate measurements could be taken is it possible to schedule another site visit?
> Response: No additional site visits will be conducted.
>
> 9. The plan that was provided in the initial solicitation is not dimensioned nor does it have a graphic scale. It also do[es] not have any interior elevations or floor to ceiling dimensions. Can a scalable and/or a dimensioned drawing with interior elevations be provided? It would be nearly impossible to estimate the work without proper plans.
> Response: Attached is the floor plan for 2D.[5] Attached is the square footage for 2D.

Id. In response to RFI question 1, relating to whether some demolition had been tested for asbestos, the VA attached an asbestos-containing materials (ACM) report. *Id*.

Appellant made no further inquiry in light of the responses to the RFIs; it bid the project without seeking further information from the VA. Appellant maintains that the ACM report was "the only document including dimensional data for specific rooms, halls, and walls in 2D." Appellant's Post-Hearing Brief at 4. Mr. Fleming testified that DPF used the ACM report to calculate its estimate for bidding purposes. According to Mr. Fleming, information on the amount of drywall joint compound used on the walls during asbestos abatement could be derived from the ACM report and the amount of joint compound could be extrapolated into the square footage of paintable wall surface in ward 2D:

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[4] The solicitation also included the clause found at Federal Acquisition Regulation (FAR) 52.236-27, Site Visit (Construction). 48 CFR 52.236-27 (Alternate 1) (2012); Exhibit 1 at 16.

[5] The floor plan did not contain room or hall measurements for ward 2D. Exhibit 1 at 169.

> [I]f you follow that area [in the ACM report], you'll look across where you'll see drywall/joint compound. Drywall joint compound is a material, and it is equal to how much sheet rock [drywall] is in [a given] room. In turn, the amount of drywall in each room is the equivalent of paintable surface in that room.

Appellant's Post-Hearing Brief at 5 (footnotes omitted); *see also* Transcript, Vol. I at 78-80, 89-91, 176-77.[6] Mr. Fleming also represented at hearing that contracting officer (CO) Karen Butts "confirmed to DPF that 16,800 square feet referred to 'paintable wall surface.'" Transcript, Vol. I at 95. The Board concludes that the testimony, which lacks contemporaneous or other supporting evidence, is not credible to establish that DPF used such a method, that such a technique would provide usable results, or that the oral conversation with CO Butts occurred, much less that such conversation could be reasonably relied upon to interpret the contract when the solicitation was not modified.

Prior to submitting its bid, DPF had performed painting work on only one other VA contract, at the VAMC in Coatesville, Pennsylvania.[7] Mr. Fleming testified that the project "had '322,000 square feet of interior painting of patient rooms and halls' [and that] [t]his figure referred to paintable wall surface, not floor space." Transcript, Vol. I at 74-75.[8] According to Mr. Fleming, the CO in the Coatesville contract interpreted the contract as requiring DPF to paint only 322,000 square feet, and when it reached that square footage, she modified the contract to increase the scope of the painting. *Id*. Without the contract in the record, the Board gives the testimony no weight.

Mr. Fleming, in an electronic message sent on June 13, 2012, indicated, "I stand by and/or confirm my price submitted," and expressed his understanding that "the overall project consists of approx[imately] 10,000 [square feet] of vinyl floor tile removal/replacement, approx[imately] *16,000/20,000 SF [square feet] [of] painting* and $30[,000] to $40[,000] in electrical work." Exhibit 111 at 5 (emphasis added). Because DPF's bid was so much lower than the Government's estimate, DPF was asked to verify its bid, which Mr. Fleming did on June 22, 2012, including DPF's itemized breakdown of costs

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[6] It is unclear how much contemporaneous, active involvement Mr. Fleming had in bidding this contract, particularly since, as discussed later, he stated he intended to use a subcontractor to perform all the contract work in issue.

[7] The CO who administered the VAMC Coatesville contract was initially involved in the Ward 2D contract. Transcript, Vol. I at 74-75.

[8] The record does not contain a copy of the VAMC Coatesville contract.

as an attachment. Exhibits 111, 127.[9] The itemized breakdown showed DPF as planning for "approx[imately] 18,000 sq[uare] f[eet]" of painting.

The contract was awarded on June 29, 2012, in the amount of $277,000. Exhibit 5 . The notice to proceed was issued on December 11, 2012, setting the completion date as June 11, 2013. Exhibit 6. The FAR Changes clause was included in the contract. Exhibit 1 at 40-41; 48 CFR 52.243-4 (2011). The contract also included the VA Supplemental Changes clause. Exhibit 1 at 51; 48 CFR 852.236-88. Section (b)(4) of the clause, applicable for proposed changes costing $500,000 or less, provides that "[a]llowances not to exceed 10 percent each for overhead and profit for the party performing the work will be based on the value of labor, material, and use of construction equipment required to accomplish the change." Exhibit 1 at 51; 48 CFR 852.236-88(b)(4). The contract contained a requirement that the contractor diligently prosecute the work. Exhibit 1 at 25; 48 CFR 52.211-10.

A pre-construction conference was held on December 11, 2012. Exhibit 6. Mr. Fleming attended the conference with his attorney and other DPF employees, as did Ms. Germaine Talbot, the CO who issued the notice to proceed, CO Butts by telephone, and Mr. Michael Scott, a VA engineer who was assigned as the contracting officer's technical representative (COTR). *Id*. Following the conference, a walkthrough was conducted by COTR Scott, with DPF project manager Mr. Dave Keeney and Mr. Steve Miller participating on behalf of DPF. Transcript, Vol. III at 190.

On December 21, 2012, CO Butts informed Mr. Fleming that "the notice to proceed is going to be rescinded and [the VA is] going to modify the contract." Transcript, Vol. I at 83-84. Mr. Fleming testified at hearing that he did not want to enter into a modification but was told by CO Butts that if he did not sign the modification his firm's contract would be terminated for default. *Id*. at 109. He stated that in negotiating the modification the VA made some concessions: "I got Karen Butts to agree that the term [']approximately['] under the 16,800 square foot[age] would be the hard number of 16,800 square feet." *Id*. at 110. Mr. Fleming testified that he wanted the hard number "so at least there wasn't any

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[9] Mr. Fleming testified that while DPF would not have lost money on the contract, DPF's bid did not carry any mark-ups for general and administrative expenses (G&A) or profit because he saw this contract as a way "to get our foot in the door" at the VAMC Washington. Transcript, Vol. I at 86. "And this particular [contracting office] at the [VAMC Washington] had a five year IDIQ [indefinite delivery, indefinite quantity solicitation] out, we knew about it and we wanted to show them what we could do and go after the IDIQ [contract]." *Id*.

ambiguity." *Id*.[10] CO Theresa Moyer remembers the discussions differently. During the period the modification was negotiated, she was taking over contract administration from CO Butts, who was retiring. *Id*., Vol. III at 7. CO Moyer, who acknowledged that it was probably her, and not CO Butts who negotiated the modification, testified that she did not recall any discussion associated with the 16,800 square feet issue: "The only thing that I remember that was critical to [the modification] was the switching out of the work. You know, taking out the flooring and replacing it with the railings . . ., those types of things because the flooring was the most costly item that was in the proposal." *Id*. at 166-67. She remembers that she discussed with Mr. Fleming that the VA had considered terminating the contract for convenience because of the scope change, but that Mr. Fleming was very excited about getting the contract. *Id*. at 44-45. CO Moyer testified that other than the cure notice, neither she nor anyone from the VA ever threatened Mr. Fleming with a termination for default. *Id*. at 176.

On April 26, 2013, the VA and DPF executed a bilateral modification to the contract, supplemental agreement P00001. Exhibit 7.[11] Supplemental agreement P00001 stated:

> The purpose of this modification is to *document a no-cost change in the scope* which involves:
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> 1. removing from the scope replacement of floor tiles;
> 2. removing from the scope redesign and rebuild of the nurse work station;
> 3. replacing the removed work with the task of new handrail fabrication and replacement.

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[10] There is no other evidence of this purported concession in the record. Mr. Fleming does not appear to have disclosed the fact or contents of his purported negotiations with CO Butts to others in the VA until sometime during the litigation process.

[11] Notwithstanding his execution of supplemental agreement P00001 with the no-cost language, Mr. Fleming testified that the modification "changed the whole contract, fundamentally altered it and changed the entire approach and most importantly the cost of the contract. There's no way you can do what they were asking for [by] a zero cost mod[ification]. It just didn't make any sense." Transcript, Vol. I at 84. He also testified that the subcontractor that DPF had planned to use to perform the contract, All American, was unwilling to do the project under its original bid pricing, but DPF elected to perform the project itself for the bid amount. *Id*. at 85-86.

Therefore, the parties agree that the scope of work is summarized as follows, at no additional cost to the Government:

(A) Demolition and Construction work includes the items listed below:

- 2D (16,800 sq. ft.)
- Class IV Infection Control Measures (per the ICRA Form) shall be implemented during the project
- Patch/Paint for removed Room ID signs (primer + 2 coats, or 3 coats) (76 signs door signs 12" x 12")
- Replace Damaged 2' x 2' Acoustic Ceiling Tiles (Contractor to perform survey at time of award to confirm final amount) (NTE 200, VA will provide to ensure they match)
- Replace Bumper Guards/Corner Guards in patient corridors in 2D - Color shall be provided by COTR (All in the corridors)
- *Remove wall covering in patient corridors and Patch and Paint patient corridors* (primer + 2 coats, or 3 coats)
- *Remove wall covering in main corridor leading to 2D wing, patch and paint corridor* (primer + 2 coats, or 3 coats)
- Remove 2' x 2' lighting and replace with 2' x 2' Recessed Direct/Indirect Fluorescent fixture, electronic ballast for 2 ballasts (double switching) Lithonia Type
- *Remove wall covering in patient rooms and Patch and Paint patient rooms and paint corridor* (primer + 2 coats, or 3 coats)
- The nurs[e work] station will be demolished by the contractor. The VA will provide the furniture. The contractor is responsible for demolition of existing [nurse work station]. The build portion has been deleted. Replace handrails in the hallways with new handrails in accordance with code requirements.

(B) The contract completion date will be extended an additional 182 days after the contractor has notified the contracting officer of completing the badging process.

> (C) *The consideration ($0.00 change in total contract price) represents a complete equitable adjustment for all costs, direct and indirect, associated with the work and time agreed herein, including but not limited to all costs incurred for extended overhead, supervision, disruption or suspension of work, labor inefficiencies, and this change's impact on unchanged work.*

Exhibit 7 (emphasis added). Mr. Fleming executed the supplemental agreement for DPF and CO Bernadette Farnan signed for the VA. *Id*. The supplemental agreement does not include reducing the painting scope to precisely 16,800 square feet of painting; the introductory "purpose" paragraph also makes no mention of limiting or altering the painting requirements.

On April 26, 2013, the VA issued a new notice to proceed for the contract as changed by the supplemental agreement. Exhibit 96. The notice to proceed set the completion date as November 15, 2013. Exhibit 8. DPF began contract performance on May 3, 2013. *Id*.

To perform the work, DPF used a crew of three individuals, a supervisor and two workers, occasionally increasing the crew to four people. Exhibit 61. Typically, the crew would work on the site five or six days, followed by a break of three days. Exhibit 61, Daily Job Logs. During the project, ward 2D was operationally active with most of the patient rooms occupied unless they were being worked on. COTR Scott would release rooms, two at a time, for the work. Transcript, Vol. III at 187. The schedule for painting the rooms was determined strictly by patient care requirements, and no comprehensive advance schedule was promised or provided to DPF. *Id*. at 196-97. From May through July 2013, performance of the contract proceeded smoothly and without incident. *Id*. at 17, 176, 198, 203.

On July 29, 2013, DPF's on-site supervisor, Mr. Joel McAllise, informed COTR Scott that Mr. Fleming believed that DPF had exceeded the scope of work, and that he had been directed to stop work. Transcript, Vol. III at 17-18, 201-12. A teleconference was held the next day, with CO Moyer, COTR Scott, and other VA personnel participating for the VA; Mr. Fleming; his wife, Ms. Terri Fleming; Mr. Keeney; other DPF personnel; and DPF's attorney. *Id*., Vol. I at 131, Vol. III at 19. During that teleconference, Mr. Fleming stated that he believed DPF was well outside the scope of work, and that DPF was going to demobilize from the site. *Id*., Vol. I at 131-35, Vol. III at 20, 206. CO Moyer stated she would have to verify if DPF had exceeded the contract requirements. *Id*., Vol. III at 20, 208-09. She indicated that if she found DPF had exceeded the contract requirements, the VA would issue a request for proposal (RFP) for the additional work. Exhibit 119.

Referring to the July 30 telephone conference in a memorandum dated August 12, 2013, CO Moyer noted that

> Mr. Fleming appeared to be very irritated and stated "thanks but no thanks to the offer of your RFP." His tone changed drastically and he was actually somewhat yelling at the contract team. He informed us that he had exceeded his requirement and that he was going to direct his crew to remove all barriers, pack up and leave the job site. I informed him that he must make sure he has completed the contract requirements and if he demobilized prior to completing those requirements the Government would not be responsible for his costs to remobilize if he decided to return and complete the work. The remainder of the conversation was spent criticizing the VA.
>
> Shortly after the conference call ended, [VA contract specialist] Mary Case informed me the contractor was pulling off the job. The contracting team walked up to the job site and I informed the superintendent that we need to follow through with the terms of the contract, [and do a] walkthrough, punch list and final inspection. The superintendent appeared to be embarrassed and apologized for Mr. Fleming's decision. Then we left.

Exhibit 119. To assist CO Moyer in determining what work remained uncompleted, COTR Scott calculated the square footage of the patient rooms and corridors of ward 2D. Exhibit 114. He determined that ward 2D had a total of 10,195 square feet of floor space, with the patient rooms comprising 5346 square feet and the corridors totaling 4849 square feet. *Id*. He found that several contract work items had not yet been completed. *Id*.

DPF submitted an invoice on July 30 seeking $81,157 of the remaining contract balance of $92,572. Exhibit 114. The DPF crew finished the rooms they had started painting and left the work site on or about August 1, 2013. *Id*. at 211. Ms. Fleming sent an electronic message to Ms. Case on August 1, 2013, asking about payment and stating: "Our crew is demobilizing from the site." Exhibit 114 at 5. Ms. Case kept Ms. Fleming updated on the invoice payment, but on August 5, 2013, Mr. Fleming wrote to Ms. Case and Ms. Fleming:

> The CO[T]R has not responded in an exceptable [sic] time frame here. My position is '[the COTR] is creating a massive punch list' which will attempt to justify VA butt covering here.
>
> That said, if there is some legit[imate] reason to hold up my 100k payment . . . would like to know. I am respectfully requesting [a] Contracting Officer['s] determination as to the delay and cause for the delay in payment.

> VA has no right to withhold payment . . . this is heading directly down the path I said it would. I am NOT a liar and follow through as proven with performance on this contract.
>
> Respectfully asking one last time here . . . PLEASE PAY MY INVOICE.

Id. at 3.[12]

By the date DPF personnel left the job site, all of the patient rooms but not all the corridors had been painted. The parts of the corridor that were unpainted were a color that was noticeably different from the color of the parts that were painted. Where DPF stopped painting, one section of the corridor was green while the other was pink. Transcript, Vol. III at 331-32. Besides approximately 236 linear feet of painting left to do in the ward 2D corridor, the uncompleted work included wallpaper removal; wall preparation; and installing lights, corner and bumper guards, and handrails. Exhibit 9; Transcript, Vol. III at 221-22. At this point, CO Moyer understood that "Mr. Fleming had walked off the job" and that she "has to do something when a contractor walks off the job." Transcript, Vol. III at 111-12. CO Moyer testified that, despite knowing there was sufficient time for DPF to complete the contract work, she issued the cure notice because she thought that was the best way Mr. Fleming could be convinced to return to the work site and complete the contract work. *Id*. at 112. After discussing possible options with the COTR, other VA staff, and VA counsel, CO Moyer concluded that there was no less formal way to communicate with Mr. Fleming and that a cure notice was the best option to get DPF back on the job. Exhibit 119; Transcript, Vol. III at 33.

On August 13, 2013, CO Donyale Smith issued a cure notice. Exhibit 9; Transcript, Vol. III at 39. The cure notice informed DPF that "your action of demobilization on August 1, 2013, from the . . . project, without proper completion of the contract requirements, [is] a condition that is endangering performance of the contract and completion of the contract by the completion date of November 15, 2013." Exhibit 9. The cure notice listed the 236 linear feet of painting remaining as well as various other contract items that the VA believed needed to be completed. *Id*. The cure notice list also set forth estimates of the percentage of work left to be performed, and informed DPF that "unless these conditions are cured within 10 days . . . the Government may terminate for default." *Id*.

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[12] The invoice was submitted on July 30, 2013, which was a Tuesday. August 5, 2013, was a Monday. At the time Mr. Fleming complained, the VA had the invoice for only three working days.

A telephone conference was held on August 15, 2013, among CO Moyer, other VA personnel, Mr. Fleming, and other DPF personnel. Exhibit 104 at 7. During the call, CO Moyer explained that if DPF agreed to come back and complete the project, it would have until November 15 to complete the work. Transcript, Vol. III at 36. She also stated that DPF had ten days to provide the VA with a resolution as to how it planned to address the incomplete work. *Id*. at 36. The VA emphasized that DPF had more than ten days to complete the work, but Mr. Fleming replied that DPF would get the work done in ten days. *Id*. at 218. Mr. Fleming made clear to the VA that he was returning to the job site "under PROTEST" and the work he was performing was "outside [the] SOW and contract, . . . will be very time/cost expensive, . . . [and] REA's [requests for equitable adjustment] [would] follow." Exhibit 11. DPF returned to the work site on August 16, 2013, and using a crew varying from two to four workers, completed the remaining work on August 22, 2013. Exhibit 30.

On August 22, 2013, DPF submitted invoice 070206 seeking a payment of $85,969 for the preceding period's work and representing that the contract balance after payment of the invoice would be $6603. Exhibit 15. On August 26, 2013, Ms. Case forwarded to DPF documents calculating what the VA considered to be "the final mark-ups for final payment." The documents showed VA willing to pay $81,081.47 for the completed work and retaining $4325.50 for uncompleted light installation work. Exhibit 16. Mr. Fleming issued a blistering response containing various threats. *Id*. Ms. Case asked DPF whether it would accept the final invoice mark-up and noted that the VA was paying it for work performed and closing out this contract. *Id*. The VA paid DPF $81,081.47 on September 9, 2013. Exhibit 120 at 1.

The VA prepared a "cure notice update letter" and sent it to DPF via electronic message on September 10, 2013, with a release of claims stating that DPF agreed to accept the $81,081.47 as final payment and, upon payment of that sum, DPF agreed to "remise, release, and discharge the [VA] . . . of and from all liabilities, obligations, claims, and demands whatsoever under or arising from the said contract." Exhibit 130 at 3. Mr. Fleming did not execute the release of claims. Transcript, Vol. II at 258.

On October 28 and 29, 2013, DPF submitted REAs 001 through 012 to CO Moyer; the REAs contained certifications and requests for final decisions. Exhibits 21, 24, 27, 30, 33, 36, 40, 43, 46, 49, 52, 55. When timely final decisions were not forthcoming, DPF treated the matters as deemed denied, and it filed appeals pursuant to section 7103(f)(5) of the Contract Disputes Act (CDA). 41 U.S.C. § 7103(f)(5) (2012); Exhibits 22, 25, 28, 31, 34, 37, 41, 44, 47, 50, 53, 56. The appeals were docketed as CBCA 3655 through 3666. The CO issued final decisions on each claim on March 28, 2014, denying each claim in its entirety. Exhibits 23, 26, 29, 32, 35, 38, 42, 45, 48, 51, 54, 57. Appellant withdrew CBCA

3656, 3657, 3659, 3664, and 3665, and these matters were dismissed with prejudice, leaving CBCA 3655, 3658, 3660, 3661, 3662, 3663, and 3666 for decision.

2. Claim-specific Facts

a. CBCA 3655

CBCA 3655 (REA 001) involves a claim submitted on October 28, 2013, in which DPF sought $44,348.88 for additional costs it says it incurred in moving furniture out of and into patient rooms, which DPF asserts was the VA's responsibility under the contract. Exhibit 21. DPF raised the amount sought in its May 10, 2015, schedule of costs, Board Exhibit 2,[13] and then reduced its claim to $40,717.65. Appellant's Post-Hearing Brief at 59.

DPF cites to the section of the contract addressing disposal and retention as dispositive of the VA's obligation to remove the beds, chairs, tray tables, etc., in the patient rooms. That section provides:

> A. Materials and equipment accruing from work removed and from demolition of buildings or structures, or parts thereof, shall be disposed of as follows:
>
> > 1. Reserved items which are to remain property of the Government are noted on drawings or in specifications as items to be stored. Items that remain property of the Government shall be removed or dislodged from present locations in such a manner as to prevent damage which would be detrimental to re-installation and reuse. Store such items where directed by COTR.
> >
> > 2. Items not reserved shall become property of the Contractor and be removed by the Contractor from Medical Center.
> >
> > 3. Items of *portable equipment and furnishings* located in rooms and spaces in which work is to be done under this contract shall remain the property of the Government. When rooms and spaces are vacated by the Department of Veterans

[13] The Board exhibits consist of the joint statement of facts (Board Exhibit 1), appellant's statements of cost (Board Exhibits 2-13), and respondent's reply to appellant's statement of costs (Board Exhibit 14).

> Affairs during the alteration period, such items which are NOT required by drawings and specifications to be either relocated or reused will be removed by the Government in advance of work to avoid interfering with Contractors's operation.

Exhibit 1 at 68 (emphasis added). As portable equipment and furnishings, such as beds, chairs, tray tables, etc., were not shown on the contract drawings, it was the VA's responsibility to remove those items in advance of the work. *See id*. at 169. The contract required that DPF prepare the surfaces of the area to be painted by removing prefinished items such as lighting fixtures, escutcheon plates, hardware, trim, and similar items that were to be reinstalled after painting. *Id*. at 132. The VA agreed it had the responsibility of moving the beds, chairs, tray tables, etc., and that moving these items constituted extra work for DPF; however, it disputes the value that DPF places on the work.

Mr. Fleming testified that DPF moved furniture out of "at least thirty rooms," and that it took three DPF employees approximately three-and-a-half hours to move each room which contained a bed, chairs, tray table, trash receptacle, pictures, and sometimes personal items. Transcript, Vol. I at 211. According to Mr. Fleming, "everything went down to the basement" and the moving was hampered by the fact that the project site was in an active, operational hospital and DPF had only one elevator to use to move the furniture. *Id*. at 207-09. Although CO Moyer's final decision acknowledged that DPF was told VA personnel would move the furniture, the CO asserted that, according to the COTR, DPF requested that it be allowed to move the furniture so that it would be able to access the rooms sooner. Exhibit 12.

The daily logs show that DPF personnel moved furniture from patient rooms to an unspecified location, adjacent rooms, or the basement on May 28 (furniture removed from rooms 2D-124 and -125), May 29 (furniture removed from room 2D-126), June 2 (furniture removed from room 2D-128 and placed in room 2D-125), June 4 (furniture removed from rooms 2D-226 and -227 and placed in rooms 2D-127 and -128), June 7 (furniture removed from room 2D-229 and placed in room 2D-226), June 18 (furniture removed from rooms 2D-221 and -222 and placed in the basement), July 1 (furniture removed from room 2D-210 and -211), and July 17 (furniture removed from rooms 2D-129 and -230 and placed in the basement). Exhibit 61. DPF asserts in its statement of costs that two workers and a supervisor moved the furniture at hourly rates of $27.35, $33.04, and $44.19, respectively. Board Exhibit 2, at tab B. The daily logs attribute no specific hours to the tasks. Except for Mr. Fleming's unsupported testimony concluding that DPF spent an estimated sixty-four hours moving furniture, DPF failed to account for how much extra work was actually performed. Given the distances and efforts seemingly involved, we find that appellant

utilized two men for two hours each to move items to the basement and one hour each to move items within ward 2D.

In its schedule of costs DPF claims forty-seven percent applied to the direct hourly rate for "Insurance & Taxes on Labor," to cover "payroll taxes, FICA [Federal Insurance Contributions Act tax], federal taxes, unemployment taxes and workmen's comp[ensation]." Board Exhibit 2; Transcript, Vol. II at 192. In testimony, Mr. Fleming explained the forty-seven percent as: "in its simplest sense it is workmen's comp[ensation]. It is the government required matching funds. Depending on where we are it's 15 to 18 percent[,] . . . FICA, Medicare, [and] all the ancillary insurance and taxes that apply." Transcript, Vol. I at 205. There is no documentary evidence that allows us to calculate the percentage of insurance and taxes that should be applied to the labor.

b. CBCA 3658

In CBCA 3658 (REA 004), DPF sought $103,104.31 for costs it says it incurred "during the restrictive time line of the notice to cure," claiming that the additional costs were incurred "as a result of . . . work performed in excess of the scope of the contract and under emergency conditions." Exhibit 30. The claim was subsequently raised to $140,730.55 in DPF's schedule of costs, Board Exhibit 5, and later reduced to $90,578.27. Appellant's Post-Hearing Brief at 58. DPF posits that the contracting officer's actions in issuing the cure notice were an abuse of discretion, unreasonable, unsupportable, arbitrary, and capricious because "the VA contracting team had an incoherent understanding of DPF's scope of work." Mr. Fleming testified that it was not his intention to actually walk off the job, and that he "never threatened not to return," but that he was in essence on "standby until [DPF got direction from the contracting officer and/or a punchlist." Transcript, Vol. I at 138-39. He explained that DPF had not left the job site, stating: "I told everybody to leave the gear. We left the gear in the closets, we left the [job site trailer] with materials and equipment, and we withdrew with the trucks back to home base." *Id*.

c. CBCA 3660

CBCA 3660 (REA 006) is a claim for $477,208.24 for extra work that DPF says it was required to perform outside the scope of the contract. In its October 29, 2013, claim, DPF writes:

> Under the [contract], 16,800 square feet of painting and associated work was to be performed. All associated work, including but not limited to removing existing and installing new lights, removing existing and installing new railings, installing new corner guards, waste disposal, etc. was connected to the

> total square footage of painted surfaces. DPF estimated the total contract price based on a price per square foot of $16.49. [DPF] also priced this project at approximately half the government's estimate in an attempt to demonstrate their capability with the hope of securing future contracts.
>
> . . . .
>
> DPF has calculated, based on the specific rooms and the specific hallway distances that were completed, and utilizing documents that were provided during the bidding process, that the total amount of square footage that was painted prior to the notice to cure was 34,608 square feet. Therefore, DPF exceeded the contract by 17,808 square feet.

Exhibit 36. Using what Mr. Fleming refers to as the schedule of values for the project and establishing a percentage for the total contract amount associated with each part of the contract (e.g., preparing the walls and painting them, installing lights, installing bumper and corner guards, etc.) DPF created a formula to estimate its incurred costs. *Id*. In its schedule of costs the amount sought by DPF was raised to $573,011.10, Board Exhibit 7, and subsequently reduced back to $477,208.24. Appellant's Post-Hearing Brief at 57. DPF has not introduced evidence that supports the square footage in its claim or otherwise indicates the actual square footage that it painted.

d. CBCA 3661

In CBCA 3661 (REA 007), DPF originally sought $17,049.24 for administrative costs it claims it incurred during the time period between signing the contract on June 29, 2012, and receiving the second notice to proceed on April 26, 2013. Exhibit 40. In its schedule of costs DPF sought $23,271.08, Board Exhibit 8, and it now seeks $15,593.16. Appellant's Post-Hearing Brief at 60. DPF claims it "accumulated 150.5 hours of administrative time by four different personnel . . . during the approximately 43 weeks that passed between signing the contract . . . and actually starting the renegotiated contract work." The amount sought was reached by averaging the hourly rate of the four individuals who purportedly did the work to reach a rate of $57.50 per hour and multiplying it by the 150.5 hours. *Id*. As partial justification for its claim, Mr. Fleming testified that he was forced into signing supplemental agreement P00001 and threatened with default if he refused to sign. Transcript, Vol. I at 109.

e. CBCA 3662

DPF originally sought $252,283.44 in CBCA 3662 (REA 008), for what it claims were "extra expenses generated for performing extra work and other delays outside the scope

of the original contract." Exhibit 43. In its schedule of costs DPF sought $71,363.43, which it later reduced to a final amount of $27,205.70. Appellant's Post-Hearing Brief at 61. In this claim, DPF sought "extended job costs" for thirty-four days, explaining:

> Several factors contributed to the 2D Paint Halls and Walls Project taking much longer than DPF anticipated. First of all, DPF seems to have painted more than twice as much square footage as it was contracted to paint. Also, DPF was required to assemble and dissemble [sic] ICRA barriers and negative air machines when DC VAMC Facilities personnel were painting in the active patient rooms that DPF had already worked in, and right next to the areas where our crews were working, without any protection other than tarps on the floor.
>
> . . . .
>
> Due to the fact that the contract could have been satisfied with any number of combinations of room and hall sections, which would affect the number of lights and rails, etc.[,] DPF will agree that the net effect of all these delays is twice as much time spent performing than should have been required. As a supporting comparison, under the Notice to Cure, DPF completed what the COTR described as 22% of the contract in 6 days. That would extrapolate to finishing the entire contract in 27.27 days or roughly half of the 52 days that DPF spent to complete the other 78% of the contract.
>
> Being delayed in this manner cost DPF $52,283.44 in hotel expenses, additional mileage, [job site trailer] expenses, internet charges, office supplies, per diem costs, and additional supervisory costs.

Exhibit 43. DPF later modified this claim to $27,205.70, asserting that the VA was responsible for the delay costs associated with the VA directing DPF to paint 20,080 square feet beyond the contractually required 16,800 square feet and "the additional 26-workday duration, from July 7, 2013, through August 2, 2013, and from August 15, 2013, through August 22, 2013, concerning the performance of . . . additional work." Appellant's Post-Hearing Brief at 52.

f. CBCA 3663

In CBCA 3663 (REA 009), DPF originally claimed $15,462.36 for additional costs incurred for purchasing materials and labor related to assembling and disassembling ICRA barriers and negative air systems to repaint certain areas associated with damage done by VA

employees. Exhibit 46. This amount was raised to $21,105.09 in DPF's schedule of costs, Board Exhibit 10, and subsequently lowered to $14,448.35. Appellant's Post-Hearing Brief at 62.

The claim originated out of a dispute regarding whether DPF's contract required it to paint the ward 2D door frames. Rather than address the dispute, the VA elected to paint the door frames itself using VA personnel. DPF asserts that in doing so, the VA employees damaged some of DPF's painting work.[14] DPF says it was directed by the VA to correct work that was damaged by VA employees, but to do so, it needed to go back to an already painted area, reassemble the ICRA barriers, paint the area, and disassemble the barriers. DPF claims sixty-four hours for this work multiplied by the hourly rates of the three-worker crew that was responsible for ICRA work. Mr. Fleming described the process as, "you have to get all of the ICRA panels . . . re-erect them, re-tape everything off, bring in the negative air machine, get it blowing outside the building, create the negative vacuum . . . get everything inspected, then you pull your . . . paint out, do your painting, then get it reinspected again." Transcript, Vol. I at 266. However, DPF failed to identify the actual locations where touch-ups were performed or otherwise indicate the hours spent associated with this extra effort on time sheets, daily logs, etc.

g. CBCA 3666

DPF originally claimed $10,066.27 in CBCA 3666 (REA 012) for what it describes as "money earned in the performance of the contract that has not been paid" and for "delay costs [of] idle . . . and preparation time that was spent by DPF workers getting ready and waiting to actually demolish the [nurse work] station and being told each time that the VA wasn't ready." Exhibit 55. DPF's statement of costs adjusted the amount sought to $11,006.25, Board Exhibit 13, but later changed the amount it sought to $9897.36. Appellant's Post-Hearing Brief at 63.

The parties agree that the remaining contract balance part of the claim totals $7490.53. Appellant's Post-Hearing Brief at 56; Respondent's Post-Hearing Brief at 27.

As to DPF's claimed costs of $2406.83 regarding the nurse work station, DPF avers that on three separate occasions, May 20, July 8, and July 21, 2013, the VA told it to prepare to demolish the nurse work station and later told it to "standby," after DPF had fully prepared for the demolition activities. Exhibits 55, 107(a). The record contains no contemporaneous complaints to the VA of these alleged events. The daily logs for May 20, July 8, and July 21

[14] The VA does not deny that some damage may have occurred, necessitating touch-up by DPF.

make no mention of the three DPF employees being idle for six, two, and two hours, respectively. Exhibit 61. The daily logs for May 20 show that DPF was working on the job only two hours that day and did not resume work until May 28. *Id*. On July 8, two workers and a supervisor were on the job installing lights and corner guards and removing ICRA barriers; they then left the job until July 16. Two workers and a supervisor worked six hours on July 21, painting a corridor and putting up fixtures, and then left the job site until July 27.

Discussion

We will address each claim separately, but before we do so, we make some general observations.

At some point, presumably, a contractor realizes when it is performing work that it believes to be outside the scope of its contract. The contractor also knows it should start to track such work so that it can quantify the cost of the extra work it has performed. A contractor is required to give notice to the Government when it believes it is encountering or being tasked with work outside the scope of the contract so that the Government can appropriately assess the situation, make a decision on how to proceed, and, perhaps, monitor the work. 48 CFR 52.243-4 (e). Ultimately, as the party seeking additional monies above the amount of the contract, the contractor bears the burden of proving that it was required to perform work outside the scope of the contract, as well as the costs associated with that work. *Willems Industries, Inc. v. United States*, 295 F.2d 822, 831 (Ct. Cl. 1961) ("The claimant bears the burden of proving the fact of loss with certainty, as well as the burden of proving the amount of loss with sufficient certainty so that the determination of the amount of damages will be more than mere speculation."); *Wunderlich Contracting Co. v. United States*, 351 F.2d 956, 968 (Ct. Cl. 1965) (the contractor has the "essential burden of establishing the fundamental facts of liability, causation, and resultant injury"); *Servidone Construction Corp. v. United States*, 931 F.2d 860, 861 (Fed. Cir. 1991) ("To receive an equitable adjustment from the Government, a contractor must show three necessary elements – liability, causation, and resultant injury."); *Raytheon Co. v. United States*, 747 F.3d 1341, 1352 (Fed. Cir. 2014) (" a contractor seeking an equitable adjustment for increased costs has the burden of proving entitlement and quantum to its claim").

The preferred method of quantifying a claim is the actual cost method. This method is preferred because it "provides the court, or contracting officer, with documented underlying expenses, ensuring that the final amount of the equitable adjustment will be just that - equitable - and not a windfall for either the government or the contractor." *Propellex Corp. v. Brownlee*, 342 F.3d 1335, 1338 (Fed. Cir. 2003); *Advanced Engineering & Planning Corp.*, ASBCA 53366, et al., 05-1 BCA ¶ 32,806, at 162,336 (2004). Estimates

should be used to price an equitable adjustment only where actual costs are not available. *Bregman Construction Corp.*, ASBCA 15020, 72-1 BCA ¶ 9411, at 43,716.

The plain language of the CDA and the Federal Circuit's decision in *Assurance Co. v. United States*, 813 F.2d 1202 (Fed. Cir. 1987), make clear that neither party is entitled to the benefit of any presumption arising from a contracting officer's decision. De novo review precludes reliance upon the presumed correctness of the decision. *See Renegotiation Board v. Bannercraft Clothing Co.*, 415 U.S. 1, 23 (1974) (a de novo proceeding is "unfettered by any prejudice from the agency proceeding and free from any claim that the [prior] determination is supported by substantial evidence"). Thus, "once an action is brought . . . the parties start . . . before the board with a clean slate." *Wilner v. United States*, 24 F.3d 1397, 1402 (Fed. Cir. 1994) (en banc). We review de novo any conclusions made by an agency contracting officer on claims. A party bears the burden of proof on its claims, for both entitlement and quantum.

After July 16, 2013, when Mr. Fleming had decided that DPF had performed beyond the scope of the contract, he informed the VA he was demobilizing. The VA informed Mr. Fleming that there was unperformed contract work remaining on the project, and Mr. Fleming told the VA that if he was required to perform the remaining work it could expect several REAs and that would be very time and cost expensive. Mr. Fleming should have been well aware at that time that he would be required to track the type of work performed, as well as the necessary time and costs to quantify those threatened REAs.

Mr. Fleming, DPF's sole owner, was the only witness who testified on DPF's behalf.[15] He testified as if he had first-hand, direct knowledge of all the daily activities on the site, even though he visited the job site only occasionally. In some instances, his testimony contradicted what little documentary evidence is contained in the record. While Mr. Fleming may believe some of the things to which he testified, we conclude that his testimony was of little value because it was riddled by a propensity to over-inflate difficult situations and a belief that the VA "was out get him." There exist several instances where Mr Fleming escalated situations, issued threats, and inappropriately maligned the VA employees administering the contract. So, too, VA contracting personnel expressed great frustration with Mr. Fleming's approach. While we will not discuss each such instance, we will discuss examples of uncooperative behavior, how that behavior affected the contract work, and how it impacts our decision.

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[15] The expert/consultant report is of no probative value in establishing the underlying facts for determining entitlement, and not helpful for the limited recovery.

As noted by the Department of Veterans Affairs Board of Contract Appeals in *Donahue Electric, Inc.*, VABCA 6618, 03-1 BCA ¶ 32,129, at 158,827-28 (citations omitted):

> The assertion of a claim, or mere contention, is not sufficient basis on which to determine that appellant is entitled to relief. Unsupported opinion type statements are afforded little weight when such statements are little more than self-serving conclusions.
>
> Cost estimates can support a judgment if accounting records are unavailable due to no fault of the contractor. . . .
>
> > Even if use of estimates is permissible, the contractor bears the burden of proof. This burden can be satisfied by demonstrating the bases and accuracy of those estimates. The burden is not satisfied by resort to unsupported allegations.
>
> . . . [The contractor] failed to provide other than cursory support for the amount it claims. A jury verdict approach can not be utilized when the party seeking relief, as is the case here, has failed to provide credible support for its alleged costs. Thus, there is simply not enough evidence in this Record providing a reasonable basis for us to formulate a jury verdict.

The contemporaneous written record addressing these purported claims is remarkably sparse. The fact that DPF has very little proof of entitlement, as well as of its actual costs associated with the extra work it claims to have performed, works against it in our consideration of these appeals. Where, as here, actual costs should be available to the contracting officer and to us, we do not find DPF's estimates of costs compelling, particularly since these costs seem to us to be largely over-inflated.

CBCA 3655, Costs Associated With Moving Furniture out of Patient Rooms

In CBCA 3655, DPF seeks $40,717.65 for moving furniture out of patient rooms so the rooms could be painted. Sometime during the litigation, respondent indicated a willingness to pay DPF some of its alleged costs, but respondent contends that the costs of this claim must be limited to the reasonable amount of time it took DPF employees to move "portable equipment and furnishings . . . as documented by the appellant's own daily logs." Respondent's Post-Hearing Brief at 23. While Mr. Fleming testified that "everything went down to the basement" and claims that DPF moved furniture for "at least thirty rooms," the daily logs show only thirteen rooms had furniture removed from them and of these, only four

rooms had furniture relocated to the basement. We find the daily logs to provide a more reliable record than Mr. Fleming's testimony. Mr. Fleming was not at the work site most of the time and, therefore, did not have actual knowledge of the facts associated with this claim. His estimate that it took three workmen three-and-a-half hours each to move the furniture in each room is unreasonable and excessive, and not supported by the record.

Neither party has given us much of a breakdown of quantum to allow us to calculate an exact amount DPF should receive on CBCA 3655. Although DPF submitted evidence to show it incurred extra costs to move some furniture, we cannot calculate precisely what increased costs are attributable to moving thirteen rooms' worth of furniture. However, the evidence, including the drawings, enable us "to make a fair and reasonable approximation of [DPF's] damages and the jury verdict method is an appropriate means of calculating damages and arriving at a result which is fair to both parties." *New South Associates v. Department of Agriculture*, CBCA 848, 08-1 BCA ¶ 33,785, at 167,214 (citing *Bluebonnet Savings Bank v. United States*, 466 F.3d 1349 (Fed. Cir. 2006)).

Where DPF moved furniture from a patient room to another patient room, we conclude that this should have taken two workers no more than one hour per room.[16] Where the furniture was moved from a patient room to the basement, we calculate that this should have taken two workers no more than two hours per room. Based on the thirteen rooms where it was shown that furniture was moved, we find that DPF should be compensated for two workers moving furniture for seventeen hours. We used the average of hourly rates of the non-supervisory workers ($30.20 per hour) because we assume that DPF would use the least skilled workers to move furniture. This calculation resulted in a subtotal of $1026.63, to which we added ten percent overhead ($102.66 to reach a subtotal of $1129.29) and ten percent profit ($112.93)[17] to reach a total amount of $1242.22.[18] CDA interest is payable

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[16] For purposes of this appeal we assume that furniture that was moved from a patient room was subsequently returned to a patient room in ward 2D after a patient room was painted.

[17] We used the VA Supplemental Changes clause, contained in the contract, and allowed DPF ten percent overhead and ten percent profit on the extra amount. 48 CFR 852.236-88(b)(4).

[18] We recognize that the hourly rates on which we have based this decision likely do not include insurance and taxes as well as other fringe benefits that may have been paid. While DPF seeks forty-seven percent, at one point Mr. Fleming testified that the rates are "typically fifteen to eighteen percent." The VA posits that DPF has failed to provide any "records showing actual amounts paid for insurance and taxes." Respondent's Post-Hearing

from October 28, 2013, the date on which the CO received the claim, until the date of payment.

CBCA 3658, Costs for Responding to the Cure Notice

DPF seeks $90,578.27 in CBCA 3658 for extra costs it allegedly incurred performing work "in excess of the scope of the contract and under emergency conditions" to respond to the cure notice. DPF posits that the cure notice, with its "restrictive time line" required it to establish a ten day acceleration period because the contracting officer abused her discretion by issuing the cure notice without determining the scope of work in the contract. DPF also posits that since it had until November 13, 2013, to finish the work, it was arbitrary and capricious of the contracting officer to issue a cure notice.

On Monday, July 29, 2013, Mr. Fleming decided that DPF had painted more than 16,800 square feet of ward 2D patient rooms and corridors and had, therefore, reached a point in the job where it had exceeded the scope of the work required by the contract. Mr. Fleming took the position that DPF was not contractually required to paint more that 16,800 square feet of patient rooms and corridors, and instructed his on-site supervisor to stop work. In a telephone conference convened the very next day, Mr. Fleming told the VA that DPF ¶ had exceeded the scope of the contract and that DPF was going to demobilize from the site. On the day after that, DPF invoiced the VA for the remaining contract balance. The DPF crew left the work site on August 1, 2013.

On that date, there was undisputed contract work remaining to be performed and the VA wanted DPF to complete that work, as well as the disputed work. The VA position is consistent with the contract clause requiring the contractor to diligently pursue performance. Mr. Fleming's threats made it appear to the VA that DPF was not returning to the job to complete the contract, and the CO testified that she believed she needed to promptly address DPF's "walking off the job." We review Mr. Fleming's threats to leave the job site in the context of anticipatory repudiation of the contract. We recently addressed anticipatory repudiation in *MJL Brookside, LLC v. General Services Administration*, CBCA 3041, 15-1 BCA ¶ 35,935, at 175,624-25:

> Anticipatory repudiation occurs when one party to a contract communicates to the other party "a distinct and unequivocal absolute refusal to perform the

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Brief at 18. DPF did not sufficiently articulate what the hourly rates, including insurance, taxes, and fringe benefits, were. Without sufficient evidence we are unwilling to adopt the forty-seven percent rate sought by DPF, and we are also unwilling to speculate as to what those hourly rates might be.

> promise." *Dingley v. Oler*, 117 U.S. 490, 503 (1886); 4 Arthur L. Corbin, Corbin on Contracts § 973 (1964). A party to a contract has the right to discontinue performance of its contractual obligations and seek legal redress if the other party anticipatorily repudiates the contract. *United States v. Dekonty Corp.*, 922 F.2d 826, 827-28 (Fed. Cir. 1991) (citing *Dingley*, 117 U.S. at 499-500). "The obligation to mitigate damages arises '[o]nce a party has reason to know that performance by the other party will not be forthcoming.'" *Stockton East Water District v. United States*, 109 Fed. Cl. 760, 803 (2013) (quoting *Indiana Michigan Power Co. v. United States*, 422 F.3d 1369, 1375 (Fed. Cir. 2005); Restatement (Second) of Contracts § 350, cmt. b).

A contractor's refusal to perform may be expressed orally, in writing, or through action. *Fairfield Scientific Corp.*, ASBCA 21151, 78-1 BCA ¶ 13,082, at 63,907-08. Repudiation may occur at any stage of performance, and that the Government may "take immediate action to safeguard its interests when a contract upon which it is relying cannot or will not be brought to fruition, seems obvious." *James E. Kennedy v. United States*, 164 Ct. Cl. 507, 514 (1964). The Government may issue a cure notice as a precursor to a possible termination of the contract for default. *Discount Co. v. United States*, 554 F.2d 435, 438-39 (Ct. Cl. 1977).

When the Government justifiably issues a cure notice, the contractor has an obligation to take steps to demonstrate or give assurances that progress is being made toward a timely completion of the contract, or to explain that the reasons for any prospective delay in completion of the contract are not the responsibility of the contractor. The Federal Circuit has held that the failure of a contractor to give adequate assurances of performance in response to a validly issued cure notice can be treated as repudiation of the contract. *Danzig v. AEC Corp.*, 224 F.3d 1333, 1337 (Fed. Cir. 2000); *see also Tubular Aircraft Products, Inc. v. United States*, 213 Ct. Cl. 749, 750 (1977); *Composite Laminates, Inc. v. United States*, 27 Fed. Cl. 310, 323-24 (1992). Once the cure notice is issued to the contractor, "its failure to correct, explain or communicate with [the Government] during the period what corrective action that would be taken, justifie[s] a termination for default." *International Verbatim Reporters, Inc. v. United States*, 9 Cl. Ct. 710, 723 (1986).

The contracting officer acted reasonably in issuing the cure notice in an attempt to dissuade DPF from repudiating the contract and to inform Mr. Fleming of the possibility of default if DPF did not complete the contract. Mr. Fleming and his representatives told the VA that DPF was demobilizing verbally, in writing, and by its actions. While Mr. Fleming testified he never intended to walk off the job at the end of July 2013, his words and actions indicated otherwise. Mr. Fleming's testimony is not relevant because his contemporaneous

words and actions communicated to the VA that DPF would not continue working on the contract.

While DPF argues that it had three months left to complete the contract work, that also is immaterial because anticipatory repudiation is a "renunciation 'of a contractual duty *before* the time fixed in the contract for . . . performance.'" *Franconia Associates v. United States*, 536 U.S. 129, 143 (2002) (citing 4 Arthur L. Corbin, Corbin on Contracts § 959 (1951) (emphasis added); Restatement (Second) of Contracts § 250 (1979) (repudiation entails a statement or "voluntary affirmative act" indicating that the contractor/promisor "will commit a breach" when performance becomes due)).[19] We deny any costs sought by DPF associated with the cure notice and CBCA 3658.

CBCA 3660, Costs for Extra Painting

CBCA 3660 involves a claim for $477,208.24 for "extra work" that Mr. Fleming says DPF performed when the VA ordered it to paint beyond the 16,800 square feet it says was required by the contract. DPF posits that the contract required it to paint *only* 16,800 square feet, while the VA asserts that the contract required DPF to prepare and paint *all* the patient rooms and corridors in ward 2D.

This claim presents a question of contract interpretation. Contract interpretation begins with an examination of the plain language of the contract. *LAI Services, Inc. v. Gates*, 573 F.3d 1306, 1314 (Fed. Cir. 2009) (citing *M.A. Mortenson Co. v. Brownlee*, 363 F.3d 1203, 1206 (Fed. Cir. 2004)). The contract must be read as a whole, giving reasonable meaning to all its parts. *Gould, Inc. v. United States*, 935 F.2d 1271, 1274 (Fed. Cir. 1991). If the plain language of the contract is unambiguous on its face, the inquiry ends, and the contract's plain language controls. *Hunt Construction Group, Inc. v. United States*, 281 F.3d 1369, 1373 (Fed. Cir. 2002). But if the contractual language at issue is susceptible of more than one reasonable interpretation, it is ambiguous, and the Board has the task of determining which party's interpretation should prevail. *Gildersleeve Electric, Inc. v. General Services Administration*, GSBCA 16404, 06-2 BCA ¶ 33,320, at 165,210.

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[19] A separate basis exists to deny this claim. It is clear from the contemporaneous record that any acceleration that may have occurred as a result of the cure notice was not compelled by the VA and was of DPF's own volition. The VA made clear to DPF that the deadline in the cure notice was for DPF to provide the VA with a resolution as to how it was going to address the incomplete work left on the contract, not to actually complete the work. The VA acknowledged to DPF that it had until the completion date of the contract, November 15, 2013, to complete the work.

In this contract, as originally awarded, it is clear that DPF was required to paint all the patient rooms and corridors of ward 2D. The contract originally specified that the contractor was required to provide all supervision, labor, materials and equipment to, among other things: remove the wall covering in the patient rooms of ward 2D, patch and paint the patient rooms and corridors, and replace the floor tiles in the patient rooms and main corridor.

Supplemental agreement P00001, while replacing the flooring requirements with handrail requirements, still specified that DPF was to patch and paint the patient rooms and corridors of ward 2D. The fact that the notation of the 16,800 square feet was moved or the word "approximately" was omitted from the supplemental agreement does not change the contract's painting requirements.[20] This was not a contract in which a contractor could reasonably assume it could paint some rooms and some of the corridors in ward 2D and then stop when it had painted 16,800 square feet, leaving portions of rooms and/or the corridors unpainted and a different color. In reading the contract as a whole, to give meaning to all its parts, there is no ambiguity; DPF agreed to paint all of the rooms and corridors in ward 2D. The VA required no more than that, and DPF is not entitled to additional payment for simply fulfilling the painting requirements of the contract. To hold differently would convolute the plain meaning of both the contract and the supplemental agreement.

DPF urges us to read the contract out of context by making several arguments. DPF posits that the "16,800 square feet" term unambiguously refers to "paintable surface." Appellant's Post-Hearing Brief at 35. Mr. Fleming states this was a "painting contract" and a square footage measurement of any other surface would have no value for a painter. We disagree. The contract stated that ward 2D was approximately 16,800 square feet. The unamended contract required, in pertinent part, demolition and flooring replacement. The removal and replacement of the flooring was the most expensive part of the contract. Thus, the contract can hardly be characterized as a "painting contract," as DPF asserts. The contract does not specify the measurement to which the 16,800 figure referred. As originally envisioned, the greatest cost in the contract was for flooring. COTR Scott assumed that the 16,800 figure referred to the square footage of the floor in ward 2D, although when he measured the floor it was only 10,195 square feet.

Mr. Fleming testified that DPF based its bid on only 16,800 square feet of painting being required. DPF makes much about the word "approximate" being left out of the 16,800 square footage line in the supplemental agreement, testifying that CO Butts deliberately left the word out to establish the 16,800 square foot as a "hard" number that the parties actually

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[20] Also, the General Requirements clause of the contract, which was not addressed by supplemental agreement P00001, never used the word "approximately" in reference to the 16,800 square feet.

negotiated. The Board does not give Mr. Fleming's self-serving testimony weight, particularly when there was no evidence from the potential subcontractor who was helping price the work. Without substantiating evidence, and there is none in the record, we discount the testimony. Further, some of the figures provided by DPF show it estimating 18,000 square feet to be painted. Had the VA agreed that 16,800 square feet was a "hard" number, limiting the scope of the painting, we would expect to see some documentary evidence of such a fundamental change to the contract reflected in supplemental agreement P00001, just as we saw documentary evidence of the changes to the nurse work station and handrails. Without more proof that the word "approximately" was intentionally omitted so that DPF was required to paint *only* 16,800 square feet, we conclude that the omission does not change the interpretation of the contract, which required DPF to paint *all* the patient rooms and corridors of ward 2D. We find DPF's other arguments that the VA understood the 16,800 square foot number to be a "hard" number also to be unsupported by the record.

Even if the Board adopted DPF's interpretation, DPF would lose on this claim. It has not factually supported the actual square footage of the painting work performed. Appellant's methodology for estimating its costs in this claim, using the joint compound in the ACM report, was not credible. Also, DPF has only provided an estimate of how much painting was completed. Where it could have measured the actual painting performed, we are not inclined to use estimates.

The parties' focus on the 16,800 figure is immaterial because when the contract is read as a whole to give meaning to all of its parts, it clearly, and without ambiguity, required DPF to paint all the ward 2D patient rooms and corridors. CBCA 3660 is denied.

CBCA 3661, Costs for Administrative Time Preceding the Notice to Proceed

Asserting that it "accumulated 150.5 hours of administrative time . . . during the approximately 43 weeks that passed between signing the contract . . . and actually start[ing] the renegotiated contract work," DPF seeks $15,593.16 for administrative costs in CBCA 3661. DPF posits that during this time, "DPF employees Dave Keeney and John Kelly were involved in acquiring then reacquiring badges, creating administrative paperwork, estimating costs for the various changes that VA required, talking with VA Contracting Officials, etc." However, after purportedly incurring costs associated with 150.5 hours of administrative time, DPF entered into a supplemental agreement P00001, a bilateral no-cost modification, which deleted work, added other work, changed the completion date, and provided that

> the consideration ($0.00 change in total contract price) represents a complete equitable adjustment for all costs, direct and indirect, associated with the work and time agreed herein, including but not limited to all costs incurred for

> extended overhead, supervision, disruption or suspension of work, labor inefficiencies, and this change's impact on unchanged work.

The Court of Appeals for the Federal Circuit in *McAbee Construction, Inc. v. United States*, has held that: "if the 'provisions are clear and unambiguous, they must be given their plain and ordinary meaning,' *Alaska Lumber & Pulp Co. v. Madigan*, 2 F.3d 389, 392 (Fed. Cir. 1993), and the court may not resort to extrinsic evidence to interpret them." 97 F.3d 1431, 1435 (Fed. Cir. 1996) (citing *Interwest Construction*, 29 F.3d 611, 615 (Fed. Cir.1994)). We discussed this precise release language in *MJL Enterprises, Inc. v. Department of Veterans Affairs*, CBCA 2708, 12-2 BCA ¶ 35,167, at 172,562, where we held that the arguments made by MJL allowed the issues to survive the Government's motion for summary relief.[21] *MJL* is distinguished from this case because DPF failed to make any compelling arguments that would defeat this unambiguously worded release.

As to Mr. Fleming's testimony that DPF was coerced into accepting supplemental agreement P00001, there is no compelling evidence showing that the VA in any way forced Mr. Fleming to execute the modification. Only in his testimony does Mr. Fleming state he was coerced. Other contemporaneous evidence in the record shows that Mr. Fleming was eager to obtain this contract work, did not include G & A or profit in DPF's bid, and hoped to get additional work at the VAMC Washington as a result of good performance under this contract. A business decision, such as the one made by Mr. Fleming, does not constitute coercion.

Appellant has presented no compelling evidence or argument to explain why the release it agreed to in supplemental agreement P00001 should not preclude its present claim. The language in the supplemental agreement is unambiguous and comprehensive in stating that the change was at "no cost" to the VA, and in precluding further efforts to recover "costs, direct and indirect, associated with the work and time agreed herein, including but not limited to all costs incurred for extended overhead, supervision, disruption or suspension of

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[21] MJL made three arguments in opposition to what the VA characterized as an "unambiguous release" set forth in the supplemental agreement: (1) that the release only covered costs associated with the work and time giving rise to the change; (2) neither party intended that the release cover the claimed amounts related to the supplemental agreement; and (3) granting the motion for summary relief would only resolve a part of the appeal. The Board concluded that "[t]he declarations submitted by MJL are sufficient for us to conclude that genuine issues of material fact exist as to the intended scope of the releases." *MJL*, 12-2 BCA at 172,562.

work, labor inefficiencies, and this change's impact on unchanged work." Clearly, DPF released the VA from the purported administrative costs it now seeks in CBCA 3661.

CBCA 3662, Extended Job Costs for the Painting Work

DPF originally sought $252,283.44 in CBCA 3662, but later reduced its claim to $27,205.70, asserting that the VA was responsible for "extended job costs" associated with the additional twenty-six days, from July 7 through August 2, and from August 15, through August 22, 2013. As we have found in CBCA 3660 that DPF was not required to perform extra painting work, so too, DPF is not entitled to any "extended job costs" associated with that work.

CBCA 3663, Additional Painting Touch-up Costs for Repairing Painting Work Damaged by the VA

In CBCA 3663 DPF seeks $14,448.35 for additional costs it claims it incurred for purchasing materials and providing labor related to assembling and disassembling ICRA barriers and negative air systems to touch up certain areas associated with damage done by VA employees. DPF posits that in painting door frames in ward 2D, VA employees damaged some of DPF's painting work, requiring it to go back and correct work that had previously been done. This touch-up work required DPF to reassemble some of the ICRA barriers, paint the area, and dissemble the barriers. Mr. Fleming estimates that it took DPF sixty-four hours to do the work associated with the touch-up.

Other than Mr. Fleming's testimony, there is no evidence that this work was actually performed. No contemporaneous written notice was provided to the VA that DPF considered this activity to be a change to the contract until over two months after DPF left the job site and filed its claim. There does not appear to have been any concurrent dialogue with the VA that DPF considered the touch-up work to be a change to the contract. There is no documentary evidence establishing when or where these touch-ups occurred. More specifically, the daily logs do not provide information on when or where this purported additional work was performed. We expect the daily logs to track this type of changed work had it actually been performed. Furthermore, although the claim is partly for the purchase of materials, there is no documentation to establish that materials were actually purchased. Even if there were instances in which DPF had to do touch-up work, through no fault of its own, we have no way to quantify what extra work might have been performed. We find Mr. Fleming's testimony alone is insufficient to meet DPF's burden of proving the extent to which any extra touch-up work might have occurred, particularly since there is no clear evidence as to him being on job site during the time frame in which the extra work supposedly occurred.

CBCA 3666, Costs for Idle Time and Payment of the Contract Balance

In CBCA 3666 DPF claims it is entitled to $9897.36, which is comprised of the remaining contract balance of $7490.53 and costs of $2406.83 for "idle time" DPF says was associated with demolishing the nurse work station.

As for the idle time claim, DPF posits that, on three separate occasions, May 20, July 8, and July 21, 2013, the VA directed it to prepare to demolish the nurse work station and DPF made appropriate preparations to perform the demolition, only to have the VA order it to standby. There is no mention of idle time in the daily logs for those days. We see no supporting evidence in this record. Again, we decline to rely on Mr. Fleming's testimony alone that his workers were idle because of some act of the VA, particularly when the daily logs contradict that testimony and show workers performing contract work.

As earlier noted, the parties agree that the remaining contract balance part of the claim totals $7490.53. Appellant's Post-Hearing Brief at 56; Respondent's Post-Hearing Brief at 27. However, the VA posits that DPF has not invoiced for this final amount and, therefore, it has not paid the undisputed final payment. We disagree; invoice 070206 essentially sought this final payment. DPF is entitled to payment of $7490.53, plus CDA interest from October 29, 2013, the date the claim was submitted to the contracting officer, until the date of payment.

Decision

CBCA 3655 and 3666 are **GRANTED IN PART**. The Department of Veterans Affairs shall pay the following amounts to Douglas P. Fleming, LLC: in CBCA 3655, $1242.22, plus interest calculated pursuant to the CDA from October 28, 2013, until the date of payment; in CBCA 3366, $7490.53, plus interest calculated pursuant to the CDA from October 29, 2013, until the date of payment. CBCA 3658, 3660, 3661, 3662, and 3663 are **DENIED**.

PATRICIA J. SHERIDAN
Board Judge

We concur:

JOSEPH A. VERGILIO
Board Judge

JONATHAN D. ZISCHKAU
Board Judge