



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

MOTIONS FOR PARTIAL SUMMARY JUDGMENT
AND SUMMARY JUDGMENT DENIED: November 30, 2023

CBCA 6987

STELLAR J CORPORATION,

Appellant,

v.

DEPARTMENT OF TRANSPORTATION,

Respondent.

Ryan W. Dumm and Ryan M. Gilchrist of Seyfarth Shaw LLP, Seattle, WA, counsel for Appellant.

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

Before Board Judges **GOODMAN**, **KULLBERG**, and **ZISCHKAU**.

GOODMAN, Board Judge.

Appellant, Stellar J Corporation (Stellar J), filed this appeal from a decision of a contracting officer of respondent, Department of Transportation, Federal Highway Administration (FHWA), denying appellant's certified claim. Appellant has filed a motion for partial summary judgment, and respondent has filed a motion for summary judgment. We deny the motions.

Background

The Contract and the Dispute

This appeal arises from a construction contract (the contract)¹ between appellant and respondent to construct improvements to the Wyeth Trailhead section of the Historic Columbia River Highway State Trail in Hood River County, Oregon, including seven retaining walls, two of which are designated as Wall 1 (W1) and Wall 2 (W2). Appeal File, Section A, Tab 1.² The dispute involves W2, which appellant was required to design and construct pursuant to the contract.

The Contract Bid Schedule

Schedule A, which is the bid schedule incorporated into the contract, contains the following bid items relevant to this appeal. “CQ = Contract Quantity” appears at the top of each page.

Item No. 20801-0000
STRUCTURE EXCAVATION
Line A0600, Quantity 3,427
Unit, CUYD [cubic yard] (CQ)
Unit Price \$100.00
Amount [\$]342,700.00

Item No. 20803-0000
STRUCTURAL BACKFILL
Line A0640, Quantity 1,242
Unit, CUYD (CQ)
Unit Price \$105.00
Amount [\$]130,410.00

¹ The contract utilized the “Standard Specifications for Construction of Roads and Bridges on Federal Highway Projects,” referred to as Federal Project (FP)-14. The contract also contained special contract requirements (SCRs) that amend and supplement the FP-14.

² Unless otherwise noted, all exhibits are found in the appeal file. The appeal file is divided by sections that are then subdivided by tabs.

Item No. 25501-1000
 MECHANICALLY STABILIZED EARTH WALL, WELDED WIRE FACE
 Line A0860, Quantity 37,503
 Unit SQFT [square feet] (CQ)
 Unit Price [\$]22.00
 Amount [\$]825,066.

Item No. 25701-0200
 CONTRACTOR FURNISHED MECHANICALLY STABILIZED EARTH WALL
 DESIGN, WALL W2
 Line A0940, Quantity All
 unit LPSM [lump sum]
 unit price \$4000
 Amount \$4000

Section A, Tab 1 at 38-39.

Contract Provisions Concerning Payment of Contract Quantities

The contract contained the following provisions defining “Contract Quantity” and specifying the payment method:

[FP-14 subsection] 109.02 Measurement Terms and Definitions. . . .

. . . .

(b) Contract quantity. *The quantity to be paid is the quantity listed in the bid schedule.* The contract quantity will be adjusted for authorized changes that affect the quantity or for errors made in computing this quantity. If there is evidence that a quantity specified as a contract quantity is incorrect, submit calculations, drawings, or other evidence indicating why the quantity is in error and request in writing that the quantity be adjusted.

Section A, Tab 3 at 46 (emphasis added).

[FP-14 subsection] 255.07 . . . :

When measuring mechanically-stabilized earth walls by the square foot . . . , measure the front face of wall excluding footings.

Id. at 164.

[FP-14 subsection] 109.05 Scope of Payment. Payment for contract work is provided, either directly or indirectly, under the pay items listed in the bid schedule.

(a) Direct payment. Payment is provided directly under a pay item listed in the bid schedule when one of the following applies:

(1) The work is measured in the Measurement Subsection of the Section^[3] ordering the work and the bid schedule contains a pay item for the work from the Section ordering the work.

(2) The Measurement Subsection of the Section ordering the work, references another Section for measuring the work and the bid schedule contains a pay item for the work from the referenced Section.

(b) Indirect payment. Work for which direct payment is not provided is a subsidiary obligation of the Contractor. Payment for such work is indirectly included under other pay items listed in the bid schedule. This includes instances when the Section ordering the work references another Section for performing the work and the work is not referenced in the Measurement Subsection of the Section ordering the work.

Compensation provided by the pay items included in the bid schedule is full payment for performing contract work in a complete and acceptable manner. Risk, loss, damage, or expense arising out of the nature or prosecution of the work is included in the compensation provided by the pay items.

Work measured and paid for under one pay item will not be paid for under other pay items.

The quantities listed in the bid schedule are approximate unless designated as a contract quantity. Limit pay quantities to the quantities staked, ordered, or otherwise authorized before performing the work. Payment will be made for the actual quantities of work performed and accepted or material furnished

³ The contract's "Measurement Subsection" is FP-14 subsection 255.07, which was quoted previously.

according to the contract. No payment will be made for work performed in excess of that staked, ordered, or otherwise authorized.

Id. at 50-51 (emphasis added).

52.211-18 Variation in Estimated Quantity (Apr 1984)

If the quantity of a unit-priced item in this contract is an estimated quantity and the actual quantity of the unit-priced item varies more than 15 percent above or below the estimated quantity, an equitable adjustment in the contract price shall be made upon demand of either party. The equitable adjustment shall be based upon any increase or decrease in costs due solely to the variation above 115 percent or below 85 percent of the estimated quantity. If the quantity variation is such as to cause an increase in the time necessary for completion, the Contractor may request, in writing, an extension of time, to be received by the Contracting Officer within 10 days from the beginning of the delay, or within such further period as may be granted by the Contracting Officer before the date of final settlement of the contract. Upon the receipt of a written request for an extension, the Contracting Officer shall ascertain the facts and make an adjustment for extending the completion date as, in the judgment of the Contracting Officer, is justified.

Section A, Tab 1 at 88 (emphasis added).

Drawing M.20

Drawing M.20 contains two tables that are entitled “Wall W1 QUANTITIES” and “Wall W2 QUANTITIES.” Section A, Tab 2 at 305. The table for W2 contained two items:

Item No. – 25501-1000; Item – Mechanically Stabilized Earth Wall, Welded Wire Face; Quantity – 34597; Unit – SQFT; Notes (1).

(The last entry, Notes (1), referred to the ESTIMATE NOTES on the drawing, which designated (1) as a Contract Quantity.⁴)

⁴ The contract quantity of 37,503 square feet for “Mechanically Stabilized Earth [MSE] Wall, Welded Wire Face” on Schedule A, referenced above, is the total of the square footage designated by the estimate note as the contract quantity for W1 (2906 square feet) and W2 (34,597 square feet) on drawing M.20. Section A, Tab 2 at 305.

Item No. – 25701- 0200; Item – Contractor Furnished Mechanically Stabilized Earth Wall Design, Wall W2; Quantity – 1; Unit – LPSM.

Id. Drawing M.20 also included a table labeled “For Information Only Wall W2,” which listed the following: structure excavation (8270 cubic yards), granular backfill (2190 cubic yards), select granular backfill (14,460 cubic yards), geotextile (7430 square yards), drain pipe (2290 linear feet), and topsoil (1580 cubic yards). *Id.*

With regard to the “for information only” table of quantities, appellant states:

The table identified informational quantities for structure excavation, granular backfill, select granular backfill, geotextile, drain pipe, and topsoil. All of these elements were necessary to construct Wall W2. *None of these elements were separate pay items in the Contract bid schedule; they were included in the overall square footage of the face of MSE [Mechanically Stabilized Earth] Walls W1 and W2. . . .* The Government included the table of quantities on Drawing No. M.20 to provide information to prospective bidders to develop a price for Walls W1 and W2.

Appellant’s Statement of Undisputed Facts ¶¶ 21-22 (emphasis added).

Explanation of “For Information Only Quantities”

Appellant refers to the Government’s Western Federal Lands Highway Division Estimating Handbook.⁵ Declaration of Ryan W. Dumm in Support of Appellant’s Motion for Partial Summary Judgment (June 9, 2023), Exhibit B. The introduction to this handbook states: “The objective of this manual is to provide guidance for developing estimates at the various milestones, selecting bid items and methods of measurement, rounding, and presenting quantities, and pricing item work.” *Id.* at 1. A chapter entitled “FOR INFORMATION ONLY QUANTITIES” reads in relevant part:

6.1 General

Many bid items require multiple materials and multiple steps to perform the full scope of the bid item. . . . In many situations, a contractor can use the information provided in the PS&E [plans, specifications, and estimate] to estimate their bid prices

⁵ This handbook is not mentioned in the contract but contains information relevant to contract terms.

In some situations, the scope of work may be more unique, or the work and the material quantities associated with performing a bid item may not be readily apparent from the resources listed above. *In this case, the Designer needs to add information to the Plans to enable bidders to accurately estimate their price for performing the work.*

6.2 Do Not Measure for Payment

When “For Information Only” work/quantities are provided, that work is not measured for payment. This is addressed in Subsection 109.05(b) of the FP [Federal Project-14] which states: *Indirect payment. Work for which direct payment is not provided is a subsidiary obligation of the Contractor. Payment of such work is indirectly included under other pay items listed in the bid schedule. . . .*

6.3 Examples

The examples below describe situations where “For Information Only” quantities have been provided in the Plans.

Example 1 – Mechanically Stabilized Earth Wall

The Repair Mather Memorial Slide Area project (WA NPS MORA 12(1)) contained Section 255 MSE Walls. *As shown in the table, MSE walls were measured and paid for by the square foot. In order to obtain a more accurate bid for the work, ‘for information only’ quantities were estimated and provided in the Plans. Note that the bid item number (Item 25501-0000) is only provided for the bid item shown in the tabulation of bid quantities and that indirect work items are labelled [sic] as “For Information Only” and contain no bid item numbers.*

[Table omitted — blurred out in Exhibit B.]

In some cases, an item listed in ‘For Information Only’ table will also appear as a bid item elsewhere in the Plans. Possible examples for such items from the table above could be ‘Excavation,’ or ‘Object Marker Post White Plastic.’ *This can cause confusion as to when this item is paid for and there is a risk that contractors may mistakenly assume the work will be paid for directly in all cases, and likewise the contractor may not cover their cost for the work listed in the ‘For Information Only’ table. See the “Do Not Measure for Payment” section above for additional guidance in this situation.*

Id. at 73-76 (emphasis added).

Design and Construction of W2

From February 7 through June 5, 2019, the parties exchanged detailed correspondence with regard to appellant's design and construction of W2. In this correspondence, appellant asserted that, although it did ultimately design and construct W2, the specifications were defective, and it was entitled to additional costs for quantities of materials used in excess of the "for information only" quantities on drawing M.20, resulting in an increase to the contract quantity of the square footage of the wall surface. Section I, Tabs 23-1 to 23-6.

Appellant's Request for Equitable Adjustment (REA)

By letter dated July 22, 2019, appellant submitted an REA, which quoted subsection 109.02 of the contract:

Stellar J argues that the justification standard in using Specification 109.2b should not be because the "As Bid" quantity is unattainable, but rather, because the "As Bid" quantity is not an accurate quantification of the scope of work that was needed to build the Wall #2 in conformance to the final design; the final design being that design stamped by the approved 3rd party engineer and approved for construction by the Owner. As the contractor paying for the changes to the scope of work in both additional time and money, Stellar J is damaged because of these changes and is owed an equitable adjustment to the contract for these unforeseeable additional costs and time to perform the work.

....

Stellar J hired Otak Engineers to quantify and to compare the quantities yielded from the "As Bid" vs. "As Built" designs for Wall #2 using the digitized topography provided by the Owner.

Otak's analysis quantified the wall face surface area increased by 4% as compared to the wall face surface area defined in the bid schedule. Further, Otak's analysis quantified that the volume of materials to be excavated increased by 98% and that the volume of structural backfill needed to construct Wall #2 increased by 52%.

Section I, Tab 23-7 at 1-2 (footnotes omitted).

In the REA, appellant calculated these increases based on the “for information only” quantities listed in the W2 quantities table on drawing M.20, which it describes as the “as-bid” quantities. Appellant calculates the “as bid” and “as-built” quantities as follows:

	As Bid (yd3)	As Built (yd3)	Increased Quantity	% Increase
Excavation	8240 ^[6]	16,284	8044	98%
Total Granular Structural Backfill + Total Select Granular Structural Backfill	16,650 ^[7]	25,280	8630	52%
Wall Face Area	34,597[ft2]	36,008[ft2]	1,411	4%

Id. at 2.

As the result of these alleged increased quantities, appellant calculated its equitable adjustment as follows:

	Increased Quantity	Cost Reference [from Schedule A]	Bid Price (\$/unit)	Extended Total
Excavation	8044	20801-0000	100	804,400
Total Granular Structural Backfill + Total Select Granular Structural Backfill	8630	20803-0000	105	906,150
Wall Face Area	1411	25501-4000	22	31,042

⁶ This amount of 8240 appears to be erroneous, as the “for information only” quantity for structure excavation on drawing M.20 was 8270. The increased quantity of 8044 therefore appears to be overstated by thirty square yards. This apparent error appears to have been corrected in the certified claim, which alleges an increased quantity of 8014.

⁷ This amount of 16,650 is the total of the “for information only” quantities for granular backfill (2190) and select granular backfill (14,460) on drawing M.20.

Total Equitable Adjustment	\$1,741,592
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Id.

By letter dated August 26, 2019, respondent stated:

[T]here has been an increase in the area of vertical wall face on Wall 2. The additional wall face amounts to an increase of 1,411 square feet. Per FP-14 Section 255.07 for pay item 25501-1000, an adjustment is warranted for this additional 1,411 square feet. As this is a contract quantity pay item, a contract modification will be issued to account for the additional face area of the structure.

Section I, Tab 23-8.

Appellant's Certified Claim

On July 8, 2020, appellant submitted to the contracting officer a certified claim pursuant to the Contract Disputes Act (CDA), 41 U.S.C. §§ 7101–7109 (2018), in the amount of \$1,707,550, seeking alleged additional costs incurred for the construction of W2—\$801,400 for additional structural excavation (referred to as “excavation” in the REA) of 8014 cubic yards (unit cost \$100) in line A0600.1 and \$906,150 for additional structural backfill (referred to as “Total Granular Structural Backfill + Total Select Granular Structural Backfill” in the REA) of 8630 cubic yards (unit cost \$105) in line item A0640.2. Section C, Tab 6 at 1-2. The total claim amount differs from that of the REA because the correct “for information only” quantity of 8270 cubic yards is used to calculate the increase for excavation of 8014 cubic yards, and no claim is made for an increase in square footage of the wall face area.

The Contracting Officer's Decision

On December 2, 2020 the contracting officer issued a decision denying the claim, stating in part:

Wall W2 Quantities

....

In regard to the measurement of the wall quantity installed, the contract designated the bid item for Wall W2 (25501-1000) as a Contract Quantity.

FP-14 Subsection 109.02(b) defines a Contract Quantity as follows: “The quantity to be paid is the quantity listed in the bid schedule. The contract quantity will be adjusted for authorized changes that affect the quantity or for errors made in computing this quantity. If there is evidence that a quantity specified as a contract quantity is incorrect, submit calculations, drawings, or other evidence indicating why the quantity is in error and request in writing that the quantity be adjusted.” In the case of Wall W2, no changes which affected the bid quantity were authorized by FHWA, and no errors were made in calculating the designed quantities listed in the contract. The additional quantity of the face of wall designed and constructed by Stellar J for Wall W2, as shown in Submittal 255-01a, was not required in the contract, and was done to increase the efficiency of construction.* Further, FHWA’s comments provided to Stellar J on the approved Wall W2 design submittal specifically reminded Stellar J that the Wall W2 quantity was a Contract Quantity. Therefore, Stellar J is not due any payment for additional wall face quantity in excess of the Contract Quantity amount shown in the contract plan drawings.

Although FHWA’s August 26, 2019 letter indicated that an adjustment was due to Stellar J for the additional quantity of the face of wall installed, the project staff has informed me that this position provided by FHWA at the time was specifically intended to facilitate settlement negotiations, and to demonstrate to Stellar J that the Government was willing to compromise. As outlined above, the additional quantity of the face of wall installed was due to Stellar J’s decisions related to design and construction of the wall. Accordingly, this Contracting Officer’s Decision serves to provide the final analysis on the Government’s behalf and to resolve the inconsistency of entitlement determination.

* Pay Item 25501-1000 Mechanically Stabilized Earth Wall, Welded Wire Face is measured by the Square Foot (SQFT) in the vertical plane.

Section D, Tab 7 at 27-28.

Discussion

Appellant has filed a motion for partial summary judgment, and respondent has filed a motion for summary judgment. The contract required appellant to design and construct a retaining wall, W2. Appellant’s certified claim seeks additional compensation for quantities used in the construction of W2 in excess of the “for information only” quantities designated on drawing M.20 for structure excavation, granular backfill, and select granular backfill.

As noted previously, the Government's Estimating Handbook for Western Federal Lands states:

In some cases, an item listed in 'For Information Only' table will also appear as a bid item elsewhere in the Plans. . . . *This can cause confusion as to when this item is paid for and there is a risk that contractors may mistakenly assume the work will be paid for directly in all cases, and likewise the contractor may not cover their cost for the work listed in the 'For Information Only' table. See the "Do Not Measure for Payment" section above for additional guidance in this situation.*

(Emphasis added.)

This excerpt from the Handbook describes the situation here. Confusion arises because structure excavation is designated in Schedule A as a *contract quantity* at a unit price of \$100 per cubic yard and a quantity of 3427, totaling \$342,700. Structural backfill is designated in Schedule A as a *contract quantity* at a unit price of \$105 per cubic yard and a quantity of 1242, totaling \$130,410. Structure excavation (the term used in Schedule A), granular backfill and select granular backfill (both terms similar to structural backfill used in Schedule A) are designated as "for information only" quantities (without unit prices) on drawing M.20 for the construction of W2 and not as contract quantities. The "for information only" quantity of structure excavation is 8270 cubic yards, more than twice the contract quantity of structure excavation in Schedule A. The "for information only" quantity of granular backfill is 2190 cubic yards, and the "for information only" quantity of select granular backfill is 14,460 cubic yards. The sum of these "for information only" quantities is more than fifteen times the contract quantity of structural backfill in Schedule A.

Wall surface square footage is designated as a *contract quantity* in both Schedule A and drawing M.20. The contract quantity of 37,503 square feet for "Mechanically Stabilized Earth [MSE] Wall, Welded Wire Face" on Schedule A, to be paid at the unit price of \$22 per square foot, is the total of the square footage designated on drawing M.20 by estimate note 1 as the contract quantity for W1 (2906 square feet) and W2 (34,597 square feet).

Additional confusion results from appellant's inconsistent use of terms in its REA and certified claim that are similar, but sometimes not identical, to those used in Schedule A and drawing M.20. Appellant's REA sought compensation for additional wall surface square footage (designated as "wall face area") and additional cubic yardage of two items designated as excavation and total granular structural backfill + total select granular structural backfill, with quantum calculated for wall surface square footage, structure excavation, and structural backfill at the unit prices in Schedule A. The excess quantities were calculated as the excess of the contract quantity for wall surface square footage and the

excess of the “for information only” quantities of structure excavation and granular backfill + select granular backfill on drawing M.20. Appellant, therefore, treated structure excavation and total granular structural backfill + total select granular structural backfill as *contract quantities* to be paid; but appellant also equated them to structure excavation and granular backfill and select granular backfill, which were designated as “for information only” quantities on drawing M.20, even though the contract quantities in Schedule A were substantially less than the “for information only” quantities on drawing M.20.

In response to the REA, respondent offered compensation for the additional wall surface square footage as a *contract quantity* measured pursuant to subsection 255.07 of the contract. However, appellant’s certified claim, submitted thereafter, only sought compensation for the additional quantities of excavation and total granular structural backfill + total select granular structural backfill structural excavation previously claimed in the REA, which it now designated as structural excavation and structural backfill, calculated in the same manner as in the REA as contract quantities.

The contracting officer’s decision denying the claim asserts that the *contract quantity* to be paid for W2 is the wall surface square footage, designated as a contract quantity in both Schedule A and drawing M.20, which was not sought by appellant in the certified claim. That decision states that additional wall surface square footage was not required to construct the wall face and alleges that its previous offer of compensation for additional square footage was an offer of compromise.

Threshold Issues of Law

The parties’ motions do not address two threshold issues of law—(1) for which contract quantities does the contract allow compensation, i.e., should appellant be compensated based on wall surface square footage (which is designated as a contract quantity on Schedule A and drawing M.20) or, instead, on the “for information only” quantities on drawing M.20 (which appellant relied on in its certified claim and in this appeal); and (2) what term(s) in the contract control this determination? Depending on how these legal issues are resolved, an issue of material fact would remain in dispute—the calculation of the actual quantity or quantities for which the contract allows compensation.

Contract Terms Governing Quantity or Quantities

The payment provision in subsection 109.02 defines “contract quantity” stating, “The quantity *to be paid* is the quantity listed in the bid schedule” and allows for adjustments in contract quantities as the result of authorized changes or errors made in computing these quantities. Subsection 109.05 defines the scope of payment and describes when a pay item in the bid schedule is paid directly or indirectly, depending on whether the measurement of

work to be performed is defined in a contract section. This section also states that “[w]ork measured and paid for under one pay item *will not be paid* for under other pay items.”

Of relevance here, subsection 255.07 provides that mechanically stabilized earth walls are to be measured by the square foot and along the front face of the wall, excluding footings. It appears that the contract quantity of 37,503 of wall surface square footage on Schedule A relates directly to the contract quantity of 34,597 of wall surface square footage for W2 on drawing M.20, as 37,503 is the total of the contract quantity of wall surface square footage for W1 (2906) and W2 (34,597) on drawing M.20. The contracting officer’s decision notes that this contract quantity on Schedule A applies to W2.

The “for information only” quantities for structure excavation, granular backfill, and select granular backfill in drawing M.20 for W2 are listed in greater quantities than the identical and similarly named items, structure excavation and structural backfill, designated as contract quantities in Schedule A. This creates an issue of material fact in dispute as to whether the unit prices and quantities of the two items on Schedule A designated as contract quantities were intended to be used for the bidding and construction of W2 or other structures.

Thus, based on these contract provisions, as indicated above, the threshold issue of law is whether the contract quantity to be paid for the construction of W2 is wall surface square footage or the quantities in excess of the “for information only” quantities in drawing M.20. To resolve this issue, it must also be determined whether the additional alleged excess quantities of structural excavation and structural backfill sought in the certified claim are contract quantities to be paid or subsumed as indirect costs under the wall surface square footage designated as a contract quantity in both Schedule A and drawing M.20, pursuant to contract subsections 109.05 and 255.07.⁸

The contract also contains the Variation in Estimated Quantity clause, which provides for an equitable adjustment for variations in unit-priced estimated quantities. This raises another issue—whether the “for information only” quantities on drawing M.20 are unit-priced estimated quantities to which this clause would apply.

⁸ Appellant has stated as to the “for information only” tables for W1 and W2 in drawing M.20: “None of these elements were separate pay items in the Contract bid schedule; they were included in the overall square footage of the face of MSE Walls W1 and W2.” Appellant’s Statement of Undisputed Facts ¶ 21.

Calculating Amounts to Be Compensated

If wall surface square footage is the only contract quantity to be paid, appellant would not be entitled to compensation for structural excavation and structural backfill sought in the certified claim because, as stated, compensation for this work would be subsumed in indirect costs. As stated previously, an issue of material fact would remain to be determined—the calculation of actual quantity for which appellant would be entitled to compensation. However, if it is determined that structural excavation and structural backfill sought in the certified claim are contract quantities to be paid as direct costs, a similar, additional issue of material fact would remain to be resolved—the calculation of the actual quantities for which appellant would be entitled to compensation.

Appellant’s Motion for Partial Summary Judgment

Appellant’s motion for partial summary judgment states that “[t]he ultimate disposition of Stellar J’s claims, and the Government’s defenses, involve genuine issues of material fact and should be adjudicated in a hearing on the merits.” Appellant’s Motion for Partial Summary Judgment at 1. Even so, appellant does not identify those issues of material fact but instead asserts that it has appropriately moved for partial summary judgment because “Stellar J has a good faith basis to request partial summary judgment on five discrete legal questions,^[9] which can and should be established upon undisputed facts.” *Id.* However, appellant states further:

None of the relief requested by Stellar J will wholly adjudicate or dispose of a claim or defense in the case, but this relief will streamline the issues for trial and move the parties closer to a negotiated resolution.

Id. at 2. In addition, appellant states:

⁹ These questions are: (1) “Does Drawing No. [M.]22 of the Plans constitute a design specification for Wall W2?”; (2) “Does Section 257.05 of the SCRs constitute a design specification for all mechanically stabilized earth walls?”; (3) “Did the Government impliedly warrant that a bidder could in fact design and construct Wall W2 as a mechanically stabilized earth wall meeting the Government’s design criteria?”; (4) “Did the Government impliedly warrant that a bidder could in fact design and construct Wall W2 as a mechanically stabilized earth wall meeting the Government’s design criteria for the quantities stated on Drawing No. M.20?”; and (5) “Is the knowledge of [respondent’s consultant] acquired during the review of Submittal 255-01a, which the Government requested, imputed to the Government?” Appellant’s Motion for Partial Summary Judgment at 1-2.

These legal issues resolve threshold matters for some of the elements of Stellar J's claims and will reduce the length of the hearing while furthering the settlement negotiations.

Appellant's Reply in Support of Motion for Partial Summary Judgment at 1.

We must determine the appropriateness of appellant's motion¹⁰ considering the requirements of this Board's summary judgment rule, which reads in relevant part:

A party may move for summary judgment on all or part of a claim or defense if the party believes in good faith it is entitled to judgment as a matter of law based on undisputed material facts. In deciding motions for summary judgment, the Board looks to Rule 56 of the Federal Rules of Civil Procedure for guidance.

Rule 8(f) (48 CFR 6101.8(f) (2022)).

Even if appellant's five questions were resolved, appellant admits that they raise threshold issues that are not dispositive of any claim or defense raised in the appeal. Appellant's motion does not identify or request resolution of the issues of law and material fact which remain in dispute that are set forth previously in this decision, the resolution of which would likely resolve the appeal.¹¹

Appellant's motive is clearly counter to the purpose of partial summary judgment—to expedite litigation and promote judicial economy—as that purpose is not served by obtaining rulings on issues that may never need to be addressed. On the contrary, using summary judgment in this manner is inappropriate, as it would prolong the proceedings and cause judicial resources to be expended needlessly. *Marshall Contractors, Inc. v. Peerless Insurance Co.*, 827 F. Supp. 91, 93 (D.R.I. 1993); *see also Stormo v. State National Insurance Co.*, No. 19-10034-FDS, 2021 WL 4973835, at *3 (D. Mass. Oct. 26, 2021); *Borup v. CJS Solutions Group, LLC*, No. 18-1647 (PAM/DTS), 2019 WL 4820732, at *1 (D. Minn. Oct. 1, 2019). This is especially true at this Board, where summary judgment

¹⁰ Respondent has raised the appropriateness of appellant's use of summary judgment. Respondent's Opposition to Appellant's Motion for Partial Summary Judgment at 1. Respondent has also offered substantive responses to the five questions posed by appellant, which will not be resolved here.

¹¹ In a footnote to its discussion of its fourth question, appellant refers to a "parallel theory," involving some contract payment provisions, which it reserves for future consideration. Appellant's Motion for Partial Summary Judgment at 9 n.1.

motions are resolved by a three-judge panel, unlike in single-judge proceedings in most forums.¹² Appellant's motion for partial summary judgment is, therefore, denied.

Respondent's Motion for Summary Judgment

In its motion for summary judgment, respondent asserts, through an expert's opinion in a report prepared for this appeal, that appellant's claim fails because appellant could have designed W2 in multiple ways so that the construction would not require the additional quantities of excavation and backfill claimed by appellant.

Respondent's expert's opinion is offered in opposition to two opinions offered by appellant's expert, thus raising issues of material fact as to the possible approaches to the design of W2 and whether these alternate designs, which were never accomplished, are relevant to the resolution of this appeal. Government's Motion for Summary Judgment at 9-11. Were these issues to become relevant to the resolution of the appeal, "trial is appropriate when there are conflicting expert opinions which would be refined by the 'fire of cross examination.'" *Northeast Savings v. United States*, 72 Fed. Cl. 173, 180 (2006) (quoting *Hodosh v. Block Drug Co.*, 786 F.2d 1136, 1143 (Fed. Cir. 1986)); *see also Trustees of Boston University v. Everlight Electronics Co.*, 105 F. Supp. 3d 116, 120 (D. Mass. 2015) (conflicting expert opinions raising disputed issues of material fact not resolved on summary judgment).

The issues of material fact raised by the parties' conflicting expert reports may never have to be addressed in this appeal because respondent's motion, as appellant's, does not address the threshold issues of law and resulting issue of material fact discussed previously—the determination of what comprises the contract quantity or quantities for which the contract allows compensation and thereafter the calculation of the quantities to be compensated.

Respondent's motion for summary judgment is, therefore, denied.

¹² As to appellant's objective of furthering settlement negotiations, the Board offers alternative dispute resolution (ADR), with a single Board judge appointed as an ADR neutral, to assist the parties. Rule 54.

Decision

Appellant's motion for partial summary judgment and respondent's motion for summary judgment are **DENIED**.

Allan H. Goodman

ALLAN H. GOODMAN

Board Judge

We concur:

H. Chuck Kullberg

H. CHUCK KULLBERG

Board Judge

Jonathan D. Zischkau

JONATHAN D. ZISCHKAU

Board Judge