UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

THIS OPINION WAS INITIALLY ISSUED UNDER PROTECTIVE ORDER AND IS BEING PUBLICLY RELEASED IN REDACTED FORM ON AUGUST 15, 2023

MOTION FOR SUMMARY JUDGMENT
GRANTED IN PART: July 31, 2023

CBCA 7077, 7103

OST, INC.,

Appellant,

v.

DEPARTMENT OF HOMELAND SECURITY,

Respondent.

Antonio R. Franco, Samuel S. Finnerty, and Todd M. Reinecker of PilieroMazza PLLC, Washington, DC, counsel for Appellant.

Patrick J. Madigan, Office of Chief Counsel, Federal Emergency Management Agency, Department of Homeland Security, Washington, DC, counsel for Respondent.

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

Opinion for the Board by Board Judge **LESTER**. Board Judge **VERGILIO** concurs in part and dissents in part.

LESTER, Board Judge.

Appellant, OST, Inc. (OST), appeals the decision by a contracting officer for the Federal Emergency Management Agency (FEMA) denying a claim from OST that incorporated a claim from its subcontractor, AmeriTask LLC (AmeriTask). FEMA has

requested summary judgment in its favor on three different grounds: (1) that the claim is barred by the six-year statute of limitations under the Contract Disputes Act (CDA), 41 U.S.C. § 7103(a)(4) (2018); (2) that OST failed to provide timely notice (under the contract's Limitation of Funds (LOF) and Limitation of Costs (LOC) clauses) that actual costs would exceed the estimated costs funded under OST's prime contract; and (3) that, because the underlying subcontract is an illegal cost-plus-a-percentage-of-cost (CPPC) contract, it is unenforceable, leaving OST without any ability to recover alleged underpayments from the Government. In addition, FEMA asks us to find that FEMA did not breach its contract by failing to pay monies for which AmeriTask never invoiced OST and that OST never invoiced FEMA.

We grant in part FEMA's motion for summary judgment, finding that (1) AmeriTask cannot assert a breach of contract based upon FEMA's non-payment of money that AmeriTask never invoiced; (2) OST cannot recover costs incurred in fiscal years for which obligated contract funding has already been fully expended; (3) a portion of OST's claim is barred by the CDA statute of limitations; and (4) AmeriTask's subcontract with OST is an illegal CPPC contract. We deny that portion of FEMA's motion asking that we bar any recovery because of the subcontract illegality, but we limit any recovery for those fiscal years in which contract funding was not fully expended to quantum meruit rather than for costs incurred.

Statement of Undisputed Facts

I. Performance Under OST's Prime Contract with FEMA

On January 2, 2008, FEMA awarded a cost-plus-fixed-fee contract, no. HSFEHQ-08-C-0130 (the prime contract), to OST to administer certain insurance and pension fund services for the National Flood Insurance Program (NFIP). Under the terms of the contract, OST's fixed fee, which was set at a specific dollar amount, would be "paid in installments based on the percentage of completion of work" in not less than monthly increments. Appeal File, Exhibit 1 at 5.[1] The original period of contract performance was January 1 through December 31, 2008, *id.* at 11, but the contract provided options for several one-year extensions of the contract, which, if exercised, would be funded incrementally. The prime contract incorporated several clauses from the Federal Acquisition Regulation (FAR), including the "Availability of Funds (Apr 1984)" (AOF) clause at FAR 52.232-18 (48 CFR 52.232-18 (2008)); the "Limitation of Cost (Apr 1984)" (LOC) clause at FAR 52.232-20; the "Limitation of Funds (Apr 1984)" (LOF) clause at FAR 52.232-22; the "Subcontracts (June

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

2007)" Alternate I clause at FAR 52.244-2; the "Allowable Cost and Payment (Dec 2002)" clause at FAR 52.216-7; and the "Fixed Fee (Mar 1997)" clause at FAR 52.216-8. Exhibit 1 at 27, 29.

From the outset of OST's prime contract through its conclusion, OST provided services and invoiced FEMA. Respondent's Statement of Undisputed Material Facts (RSUMF) ¶ 15; Appellant's Statement of Genuine Issues (ASGI) at 2. As performance under the contract continued and options were exercised, FEMA obligated fiscal year (FY) appropriated funds on an incremental basis to the prime contract—thirty-three times between January 2, 2008, and March 22, 2017. RSUMF ¶ 15; ASGI at 2; Exhibit 55.

FEMA has already paid OST all funds that were obligated to the contract, with two exceptions. RSUMF ¶ 16; ASGI at 2. In its twelfth obligation of funding (effected May 17, 2011), which covered the option exercise for work from December 29, 2010, to December 28, 2011 (year 2011), FEMA obligated $6,388,289 but has paid OST only $4,456,299.95, leaving an available balance of $1,931,989.05. Exhibit 55. In its thirteenth funding obligation (effected December 14, 2011), which covered another option exercise for work from December 29, 2011, to December 28, 2012 (year 2012), FEMA obligated $13,080,000 but has paid OST only $12,345,547.15, leaving an available balance of $734,452.85. *Id.* FEMA issued unilateral contract modifications when it obligated the funding for 2011 and 2012, each time identifying the amount of the "incremental funding" being added to the prime contract and specifying the period of performance to which the incremental funding applied. Exhibits 13, 15. With regard to the other thirty-one times that FEMA obligated funding, FEMA has paid OST the entirety of those obligated amounts, leaving no available balance outside of years 2011 and 2012. *See* Exhibit 55.

II. <u>OST's Subcontract with AmeriTask</u>

On or about January 2, 2009, OST subcontracted a portion of its prime contract to AmeriClaim, Inc. (AmeriClaim) (which was later assigned to AmeriTask) for a period of time ending in December 2015.[2] The subcontract contained language describing itself as a "cost-plus-fixed-fee" contract but defined the fixed fee as 8% of total subcontract cost, as follows:

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[2] Although AmeriClaim originally held the subcontract, AmeriClaim and OST agreed in 2014 to assign AmeriClaim's interests in and responsibilities under the subcontract to AmeriTask. For ease of reference, we refer to AmeriTask as the subcontractor.

> The Fees to be paid by OST to Subcontractor for performing the Tasks for the base period under the terms of this Agreement will be based on a cost plus fixed fee contract. These rates will be adjusted annually based on the results of an Incurred Cost Audit by [the Defense Contract Audit Agency (DCAA)]. The Fixed Fee will be billed at 8.0 percent of total cost inclusive of general and administrative expenses.

Exhibit 41 at 76. Additionally, the subcontract required AmeriTask to submit monthly invoices to OST for approval "not later than the 5th business day of the following month" (although another part of the subcontract inconsistently required AmeriTask to submit its invoices "on [the] first of each month"). *Id.* at 68, 75. It also required that "[o]n a daily basis Subcontractor staff will be required to enter all hours worked into the OST web-based time and attendance reporting system Daily to which they will all be granted access." *Id.* at 75. "The amount due on each invoice [was to be] calculated by multiplying the Fees by the Period for work performed" during that period. *Id.* at 68. In accordance with the subcontract's terms, AmeriTask consistently submitted monthly invoices to OST beginning in early 2009.

In early 2010, however, while preparing its tax returns for the year ending December 31, 2009, AmeriTask concluded that it had failed to bill OST for a significant amount of costs incurred in 2009, along with associated fees. Complaint ¶ 10; RSUMF ¶ 10; ASGI at 2; Exhibit 30 at 4. Discussions between AmeriTask and OST about AmeriTask's underbilling continued into the latter part of 2010. RSUMF ¶ 11; ASGI at 2. In October 2010, AmeriTask informed OST that, although "many variables exist that require further refinement and proper documentation," AmeriTask's "estimations strongly suggest that [AmeriTask] has substantially under invoiced OST for labor and overhead [for the period from early 2009 through September 2010] in the general estimated area of $750,000.00 to upwards of $925,000.00." Exhibit 42 at 15-16. AmeriTask asserted that "additional accounting needs to be completed before anyone is able to definitively ascertain the correct and final number" of the amounts underbilled. *Id.* at 16.

In early 2011, AmeriTask, in response to a November 2010 request from OST, hired an independent auditor to perform an extensive audit of the company's accounting system. RSUMF ¶¶ 12-13; ASGI at 2. In a letter dated April 18, 2011, the auditor concluded that AmeriTask's accounting system was compliant with generally accepted accounting principles (GAAP). Exhibit 30 at 13. On May 26, 2011, OST met with AmeriTask to discuss the underbilling issue, at which time OST provided AmeriTask with an invoicing template to use for future invoicing. RSUMF ¶ 14; ASGI at 2. In August 2011, AmeriTask submitted revised invoices to OST for 2009 and 2010, purporting to demonstrate AmeriTask's underbilling for those years.

At some point between August 2011 and August 2013, AmeriTask hired another professional government contracting accountant to audit its financial records and its accounting methods and practices. On August 15, 2013, based on that individual's guidance and recommendations, AmeriTask submitted to OST a summary of what it believed its underbillings were not only for calendar years 2009 and 2010 but also for 2011 and 2012. *See* Exhibit 30 at 5; Declaration of Alan R. Nagel (Nagel Declaration) ¶ 11. After OST requested that AmeriTask conduct an audit of its 2011 and 2012 costs, AmeriTask had its auditor revise the August 15, 2013, report to reflect only 2009 and 2010 costs. *See* Exhibit 30 at 5; Nagel Declaration ¶¶ 11-12. AmeriTask submitted the revised 2009 and 2010 report to OST on February 5, 2014. *See* Nagel Declaration ¶ 12.

OST did not notify FEMA of AmeriTask's disclosures about alleged underbillings until it received that revised report. OST asserts that, on February 6, 2014, it disclosed the underbillings to FEMA (for the first time) when, by email, it submitted the AmeriTask accountant's 2009 and 2010 incurred-cost audit report to the FEMA contracting officer. *See* Appellant's Memorandum of Points and Authorities in Opposition to Respondent's Motion for Summary Judgment, Exhibit B. OST's documentation shows that, on March 12, 2014, the FEMA contracting officer responded by email that it could not validate or approve the identified costs, citing deficiencies in AmeriTask's internal controls, the absence of historical data, and the absence of a cited DCAA audit report. *Id.* On March 13, 2014, OST informed AmeriTask that it would resubmit AmeriTask's request for payment after AmeriTask provided the requested information. *Id.* Although FEMA cannot locate this email chain in its records, there does not appear to be any question about the authenticity of the emails that OST attached to its briefing.

AmeriTask then hired a new firm, Gov-Con Solutions, Inc. (GCS), to prepare incurred-cost-submission spreadsheets for each year in which AmeriTask had performed work from 2009 through 2013. Complaint ¶ 19; Nagel Declaration ¶ 13. On May 11, 2016, AmeriTask submitted GCS's findings to OST, showing a total underbilling during that five-year period of $1,130,664.95, and provided OST with invoices for its costs and fees for each calendar year from 2009 through 2013. Complaint ¶ 19; Exhibits 45-49. OST did not at that time notify FEMA of the alleged underbillings.

III. <u>Submission of Certified Claims</u>

On February 28, 2017, AmeriTask submitted a certified claim to OST, seeking payment of $1,130,664.95 for previously unbilled costs allegedly incurred from 2009 through 2013. Exhibit 30 at 3-165. AmeriTask asserted that the increased costs represented previously unbilled direct and indirect costs, plus a corresponding increase reflecting its 8% fee. *Id.* at 6.

OST forwarded AmeriTask's claim to the FEMA contracting officer on June 14, 2017, accompanied by its own cover letter in which it requested a contracting officer's final decision on the claim. Exhibit 30 at 1-2. Attached to the claim were AmeriTask's invoices to OST for the allegedly underbilled costs, all of which were dated February 16, 2017, and none of which had been previously submitted to FEMA. *Id.* at 161-65. In its cover letter, OST asserted that, "[i]f AmeriTask's final invoices are accepted for payment by the Government, OST will submit its final invoice with its G&A applied to the AmeriTask, LLC final costs at the bottom-line level," as follows:

Year	Claimed Amount
2009	$ 450,943.00
2010	$ 92,797.00
2011	$ 282,095.00
2012	$ 179,102.68
2013	$ 125,728.00
AmeriTask, LLC Claimed Amount	**$ 1,130,665.68**
OST's G&A ( )	$
Total	**$**

Id. at 1. OST also provided the claim certification required by FAR 33.207. *Id.* at 2.

The contracting officer responded to the claim by questioning whether, because OST had not previously submitted the invoices for payment or any invoices for OST's G&A markup, the costs being claimed were due and owing and, for additional identified reasons, questioned whether the submission was a proper claim. Exhibit 39 at 7. He also questioned a representation in AmeriTask's claim to OST that FEMA had previously been provided AmeriTask's invoices for 2009 and 2010 and that FEMA had rejected them, asserting that he could find no record of any such submissions. *Id.*

On January 3, 2018, OST resubmitted the June 14, 2017, claim, accompanied by a new certification and a new invoice from OST that included its own G&A markups on AmeriTask's amended claimed costs, which, taken together, totaled $1,206,820.56. Exhibits 37 at 167, 39 at 6.

IV. OST's Appeals

On March 19, 2021, OST filed an appeal with the Board from the "deemed denial" of its June 14, 2017, certified claim, which OST said in the notice that it had "resubmitted to FEMA on January 3, 2018." The Clerk docketed that appeal as CBCA 7077. Unbeknownst to OST, on March 16, 2021, the contracting officer had issued a decision on

the claim that OST "submitted on June [14], 2017 and resubmitted on January 3, 2018," denying it in full. Exhibit 38 at 1. On April 16, 2021, OST filed a new appeal, this time an appeal of the contracting officer's actual written decision on the June 14, 2017, claim. The Clerk docketed that appeal as CBCA 7103. By order dated April 19, 2021, the Board consolidated the two appeals to eliminate the possibility of duplicative proceedings arising out of the same claim.

On April 30, 2021, OST filed its complaint in the two appeals. In it, OST increased the amount that it was claiming on AmeriTask's behalf from $1,130,664.95 to $1,979,297. Complaint ¶¶ 20, 25. OST explained that, "[i]n late 2018 through June 2019, well after the Certified Claim was submitted, GSC conducted a revised audit of AmeriTask's books and records . . . and discovered that the Certified Claim had been understated due to variances related to AmeriTask's overhead and G&A indirect rates." *Id.* ¶ 24.

On May 27, 2022, after the parties completed discovery, FEMA filed its motion for summary judgment. By order dated October 17, 2022, after the parties had fully briefed FEMA's motion, the Board requested supplemental briefing regarding FEMA's argument that OST's failure to comply with the LOF and LOC clauses in the contract barred recovery. The parties twice requested extensions of time for the supplemental briefing so that they could explore the possibility of settlement, but, after the parties could not reach an amicable resolution to their dispute, FEMA filed its supplemental brief on January 31, 2023, and OST responded with its own brief on February 24, 2023.

Discussion

I. Standard of Review

In considering jurisdiction, the Board accepts as true the undisputed allegations in the complaint and draws all reasonable inferences in favor of the appellant. *ARI University Heights, LP v. General Services Administration*, CBCA 4660, 15-1 BCA ¶ 36,085, at 176,187. To the extent that jurisdictional facts are disputed, "the party bringing the action must establish jurisdiction by a preponderance of the evidence." *Id.*

In considering a request for summary judgment, we evaluate whether there is a genuine issue as to any material fact (a fact that may affect the outcome of the litigation) and the moving party is entitled to relief as a matter of law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986). Any doubt on whether summary judgment is appropriate is to be resolved against the moving party. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986).

II. Jurisdictional Issues

A. The Contracting Officer's Concern About a Sum Certain

"As a prerequisite for the Board's jurisdiction, the CDA requires a contractor to present a valid claim over which the contracting officer has rendered a final decision." *Parsons Global Services, Inc. v. McHugh*, 677 F.3d 1166, 1170 (Fed. Cir. 2012) (citing 41 U.S.C. § 7103). If a contractor is seeking the payment of money, the claim must identify the amount sought in a sum certain. *M. Maropakis Carpentry, Inc. v. United States*, 609 F.3d 1323, 1327 (Fed. Cir. 2010).

In his decision on OST's June 14, 2017, certified claim, the FEMA contracting officer asserted that the claim did not seek relief in a sum certain, indicating that OST's reference to a future invoice for G&A that OST would submit if FEMA accepted AmeriTask's invoices rendered the amount at issue indefinite. FEMA did not raise this jurisdictional issue in its summary judgment motion, but, because the Board has an independent obligation to ensure that it possesses jurisdiction, *McAllen Hospitals LP v. Department of Veterans Affairs*, CBCA 2774, et al., 14-1 BCA ¶ 35,758, at 174,969, we address it here.

Reviewing the June 14, 2017, claim, it is clear that OST's representation that it would submit a future invoice for G&A did not render the monetary amount requested uncertain. OST specifically identified the amount of the G&A markup that it intended to invoice should FEMA approve the claim ($[redacted]) and provided a specific total dollar amount ($[redacted]), inclusive of G&A, that ultimately would be due and owing. The June 2017 submission sought a sum certain. *See Contract Cleaning Maintenance, Inc. v. United States*, 811 F.2d 586, 592 (Fed. Cir. 1987) ("All that is required is . . . a clear and unequivocal [written] statement that gives the contracting [party] adequate notice of the basis and amount of the claim."). To the extent that the June 14, 2017, claim could somehow be found lacking, OST's resubmitted claim, dated January 3, 2018, also identifies a sum certain ($1,206,820.56), albeit one slightly higher than the June 14, 2017, claim.

B. OST's Submission of AmeriTask's Invoices as a "Claim"

As discussed above, the Board's jurisdiction over a contract dispute in which the contractor seeks money depends upon whether the contractor submitted a valid claim. *Parsons Global*, 677 F.3d at 1170. "A voucher, invoice, or other routine request for payment that is not in dispute when submitted is not a claim." FAR 2.101 (definition of "claim"). An invoice "may be converted to a claim, by written notice to the contracting officer as provided in [FAR] 33.206(a), if it is disputed either as to liability or amount or is not acted upon in a reasonable time." FAR 2.101.

The first time that OST submitted AmeriTask's 2011, 2012, and 2013 invoices to the FEMA contracting officer was June 14, 2017—as attachments to what it called a certified claim. When submitted, those invoices were not in dispute. OST could not avoid the pre-existing dispute requirement of FAR 2.101 by dressing the first submission of the invoices in a way that made them look like a claim. Nevertheless, by the time that OST resubmitted its claim on January 3, 2018, a reasonable amount of time had passed within which FEMA had not acted on the invoices, allowing OST to assume that they were in dispute. Accordingly, OST's second certified request for payment on January 3, 2018, of the 2011, 2012, and 2013 invoices was a "claim" that provides us with jurisdiction over that invoice payment dispute. *See, e.g.*, *Intown Properties, Inc.*, HUD BCA 95-C-135-C9, et al., 96-2 BCA ¶ 28,363, at 141,625.

As for the 2009 and 2010 AmeriTask invoices, OST's evidence makes clear that, in February 2014, it had presented FEMA with invoices from AmeriTask for costs incurred in those two years. FEMA responded by stating that the invoices lacked sufficient information to be processed and declined to pay them. By the time that OST attached those invoices to its June 24, 2017, certified claim, they were sufficiently disputed to be a part of a "claim." We possess jurisdiction to entertain them.

C. <u>OST's Increase in Claimed Damages</u>

In the certified claim that OST submitted on June 14, 2017, and resubmitted on January 3, 2018, OST identified the amount of AmeriTask's damages (not including OST's markups) as $1,130,665.68. That amount was the sum total of final invoices that AmeriTask submitted for the five years (2009 through 2013) that AmeriTask performed. OST added a specific amount of G&A markup in the June 14 claim and a specific amount of G&A markup in the January 3, 2018, claim, identifying a total "sum certain" being claimed in each. OST alleges as its basis for relief that "the Government refused to pay [those] invoices" and that "FEMA materially breached the Prime Contract by refusing to pay" OST for the AmeriTask work. Complaint ¶¶ 29, 30.

In its complaint, OST increased the amount of the claim that it is seeking on behalf of AmeriTask from $1,130,665.68 to $1,979,297, Complaint ¶¶ 20, 25, while simultaneously announcing that it is dropping its request for a G&A markup. *Id.* ¶ 20 n.2. OST alleges that, after OST submitted AmeriTask's pass-through claim to FEMA, a third-party accounting firm audited AmeriTask's records, discovered that the certified claim was understated, and calculated that AmeriTask had incurred $1,979,297 (rather than the $1,130,665.68 originally invoiced) in unpaid costs and fees between 2009 and 2013. *Id.* ¶¶ 24, 25. OST asserts that, "[b]ecause the increase in the claimed amount arises out of the same set of operative facts, does not constitute a new claim, and is reasonably based on additional information not

available when the Certified Claim was [submitted], neither a new certified claim nor a recertified claim need be submitted for this appeal to proceed." *Id.* ¶ 26.

As long as the certified claim that the contractor submitted states an amount that the contractor was seeking in a sum certain, the contractor can, on appeal, increase or decrease the amount being sought without affecting the Board's jurisdiction. *K&K Industries, Inc.*, ASBCA 61189, 18-1 BCA ¶ 37,134, at 180,723. Here, though, the increase is problematic because of the nature of the alleged breach of contract. That is, OST asserts that FEMA breached the contract by refusing to pay the invoices presented to it, invoices that requested payment in a specific amount. OST's contract contains the standard FAR clause titled "Allowable Cost and Payment (Dec. 2002)," which provides that "[t]he Government will make payments to the Contractor *when requested* as work progresses," Exhibit 1 at 29 (quoting FAR 52.216-7(a)(1) (emphasis added)), and that, to obtain payment, "[t]he Contractor may submit to an authorized representative of the Contracting Officer, in such form and reasonable detail as the representative may require, an invoice or voucher supported by a statement of the claimed allowable cost for performing this contract." *Id.* (quoting FAR 52.216-7(a)(1)). The payments that the contracting officer approves, or disapproves, are "based upon [the] contractor invoices." *TRW, Inc.*, ASBCA 51172, et al., 99-2 BCA ¶ 30,407, at 150,328.

Under the contract's payment clause, "[t]here [is] no breach until appellant request[s] payment and the government reject[s] the request." *Parsons-UXB Joint Venture*, ASBCA 56481, 09-2 BCA ¶ 34,305, at 169,459; *see Todd Pacific Shipyards Corp.*, ASBCA 55126, et al., 11-1 BCA ¶ 34,759, at 171,087 ("[T]here can be no breach of that [payment] clause . . . until the contractor requests payment and the government fails to pay."). Here, the invoices that FEMA did not pay and that form the basis of the breach claim total $1,130,665.68. Neither OST nor AmeriTask has presented any other challenged invoices to FEMA. OST has no basis for claiming a contract breach involving additional dollars that AmeriTask never invoiced and non-payment of invoices that OST never submitted. We limit OST's potentially recoverable damages in this appeal to the breach alleged, which is FEMA's refusal to pay the amounts identified in the invoices.

III. <u>OST's Failure to Satisfy the Contract's Funding and Cost Limitation Clauses</u>

A. <u>OST's Failure to Provide Prior Notice of Cost Overruns</u>

FEMA argues that OST's claims for the unpaid subcontract costs are barred by the LOF clause (FAR 25.232-22), as well as the AOF and LOC clauses (FAR 52.232-18 and 52.232-20, respectively) in the prime contract. The AOF clause provides that "[t]he Government's obligation under th[e] contract is contingent upon the availability of

appropriated funds from which payment for contract purposes can be made." FAR 52.232-18. Pursuant to the LOF and LOC clauses, "[t]he parties estimate that performance of this contract will not cost the Government more than . . . the estimated cost specified in the Schedule." FAR 52.232-22(a); *see* FAR 52.232-20(a). "[T]he estimated cost shown in the contract constitutes a ceiling on the government's contractual liability." *Advanced Materials, Inc. v. Perry*, 108 F.3d 307, 310 (Fed. Cir. 1997).

If, at any point during performance, the contractor "has reason to believe that the costs it expects to incur under this contract in the next 60 days, when added to all costs previously incurred, will exceed 75 percent of . . . the total amount so far allotted to the contract by the Government," the contractor has to notify the contracting officer. FAR 52.232-22(c); *see* FAR 52.232-20(b)(1). Timely notice "provide[s] an option to the Government, i.e., it may decide to add more money to the contract if it appears that more will be needed or it can stop the work when the funds have been exhausted regardless of the status of the completion of the work." *Consulting Services Corp.*, ASBCA 20288, 76-2 BCA ¶ 12,124, at 58,249. "Although the clause does not provide for any penalty which automatically flows from a failure to give notice, a contractor who fails to give such notice remains responsible for the consequences which flow from such failure." *TEM Associates, Inc.*, DOT BCA 2556, 93-2 BCA ¶ 25,759, at 128,179; *see Ray Communications, Inc.*, GSBCA 15509-ST, 06-1 BCA ¶ 33,273, at 164,916 ("[A] contractor that performs work in excess of the applicable cost ceiling without obtaining express authorization from the contracting officer [to continue] does so at its own risk, unless it can demonstrate the applicability of an exception to the rule . . . .").

These cost limitation provisions "are designed to allow government officials to place limits on project expenditures unless it is determined by them that additional expenditures are warranted." *C&L Construction Co. v. United States*, 6 Cl. Ct. 791, 806 (1994) (citing 2 John Cosgrove McBride & Isidore H. Wachtel, *Government Contracts* § 23.30[3] (1984)), *aff'd*, 790 F.2d 93 (Fed. Cir. 1986) (table). As a result, such provisions "are strictly construed and enforced." *Ray Communications*, 06-1 BCA at 164,915. By enforcing estimated cost ceilings, notification requirements when a contractor is getting close to an estimated cost ceiling, and the need for contracting officer approval to incur costs beyond the ceiling, "the Government is able to ensure that the contract does not become 'a blank check drawn on the Treasury.'" *Id.* at 164,915-16 (quoting *Wind Ship Development Corp.*, DOTCAB 1215, 83-1 BCA ¶ 16,135, at 80,158 (1982)).

The parties agree that OST never provided FEMA any notice before completing contract performance in the years 2009 through 2013 that it anticipated exceeding the estimated costs in the contract. They dispute, however, whether the absence of notice

matters, with OST arguing that it falls within exceptions to the general notice requirement. We address the alleged exceptions upon which OST relies below.

B. Availability of the Obligated Funds Remaining on the Contract

In arguing that its failure to provide pre-incurrence notice of impending cost overruns is irrelevant, OST first focuses on the fact that some obligated funds still remain on the contract. It acknowledges that it expended and was paid the entirety of the funds obligated for performance in the contract's base year (2009), the first option year (2010), and all option years from 2013 onward. For performance in 2011, however, obligated funds totaling $1,931,989.05 were never spent, and, for performance in 2012, obligated funds totaling $734,452.85 were not spent. Exhibit 55. OST argues that, because the contract has "an unused, available balance of $2,666,441.90" (the total of the remaining 2011 and 2012 obligated funds), ASGI ¶ 42, there is ample funding available to pay AmeriTask's current underbilling claim, rendering irrelevant the absence of prior notice.

OST's argument ignores restrictions on the availability of appropriations imposed by law. Although funding for 2011 and 2012 was not fully expended, OST's claim includes costs incurred in 2009, 2010, and 2013, years for which all obligated funds have already been used. "The *bona fide* needs rule is one of the fundamental principles of appropriations law: A fiscal year appropriation may be obligated only to meet a legitimate, or *bona fide*, need arising in, or in some cases arising prior to but continuing to exist in, the fiscal year for which the appropriation was made." 1 General Accounting (now Accountability) Office (GAO), *Principles of Federal Appropriations Law* 5-11 (3d ed. Jan. 2004) (GAO Redbook); *see* 33 Comp. Gen. 90, 92 (Aug. 20, 1953) ("Fiscal year appropriations may properly be 'obligated' only for bona fide needs actually existing within the fiscal year sought to be charged."). By statute, FEMA is precluded (with limited exceptions) from using an appropriation for one fiscal year to pay for obligations generated in a different fiscal year:

> The balance of an appropriation or fund limited for obligation to a definite period is available only for payment of expenses properly incurred during the period of availability or to complete contracts properly made within that period of availability and obligated consistent with section 1501 of this title. However, the appropriation or fund is not available for expenditure for a period beyond the period otherwise authorized by law.

31 U.S.C. § 1502(a). Accordingly, unless the agency obligates funds using a multi-year or no-year appropriation, which FEMA did not use here, "appropriations for service of a given fiscal year cannot be used for any other purpose than the payment of the expenses incurred for the service of that year." 33 Comp. Gen. at 92; *see* 45 Comp. Gen. 59, 65 (Aug. 5, 1965).

There are situations in which an appropriation for one fiscal year might be available to pay for nonseverable work that, by necessity, has to carry over into a portion of the next fiscal year, *see* 1 GAO Redbook at 5-4, -14; 73 Comp. Gen. 77, 79 (1994), but, "where the services [being provided] are continuing and recurring in nature," like under OST's contract, "the contract is severable" and the services must be charged to the fiscal year(s) in which they are rendered. 1 GAO Redbook at 5-24 to -25. The GAO Redbook provides a clear explanation of the limitations on the use of annual fiscal year appropriations in contracts that, like OST's, involve a base contracting year with a series of one-year continued performance options:

> If an agency is contracting with fiscal year appropriations and does not have multiyear contracting authority, the only authorized course of action, apart from a series of separate fiscal year contracts, is a fiscal year contract with renewal options, with each renewal option (1) contingent on the availability of future appropriations, and (2) to be exercised only by affirmative action on the part of the government (as opposed to automatic renewal unless the government refuses). The inclusion of a renewal option is key; with a renewal option, the government incurs a financial obligation only for the fiscal year, and incurs no financial obligation for subsequent years unless and until it exercises its right to renew. The government records the amount of its obligation for the first fiscal year against the appropriation current at the time it awards the contract. The government also records amounts of obligations for future fiscal years against appropriations current at the time it exercises its renewal options.

Id. at 5-41 (citations omitted).

OST's contract operated under incremental funding that was tied to annual, single fiscal year appropriations. The services provided under the contract were segregable. As a result, although obligated funds for 2011 and 2012 were not fully expended, OST cannot rely on the availability of those funds to pay for costs incurred in 2009, 2010, or 2013. The 2009, 2010, and 2013 obligated funds were fully dispersed years ago.

We recognize that, putting appropriations issues aside, one paragraph in the LOF clause, read in isolation, might be interpreted as indicating that OST should be able to apply 2011 and 2012 obligated funds to pay for earlier years of its performance. The LOF clause provides, in relevant part, that, "[w]hen and to the extent that the amount allotted by the Government to the contract is increased, any costs the Contractor incurs before the increase that are in excess of . . . [t]he amount previously allotted by the Government . . . shall be allowable to the same extent as if incurred afterward, unless the Contracting Officer issues

a termination or other notice and directs that the increase is solely to cover termination or other specified expenses." FAR 52.232-22(i). Precedent makes clear, however, that this language, when read in conjunction with preceding paragraphs in the LOF clause, presumes that, before the contracting officer obligated the additional funding, the contractor had previously timely disclosed impending or actual cost overruns. *TEM Associates*, 93-2 BCA at 128,180-81. Without that prior disclosure, the contracting officer cannot reasonably be understood to have intended, when adding funding to the contract, that the new money would be used to pay for past cost overages rather than for new work not yet performed. *Id.* at 128,181. Only with actual notice would the contracting officer need to include language in the funding modification to limit how the added money could be spent. *See id.* Because OST never provided FEMA with notice of impending cost overages for 2009 or 2010 (or, for that matter, 2013), OST cannot rely on this provision in the LOF clause to gain access to funding.

C. OST's Claimed Exception for Costs Unknown

There are exceptions to the requirement that the contractor must provide timely notice of an impending cost overrun. One of these exceptions is that "the contractor had no reason to know of[,] and could not have known of, an imminent overrun." *Ray Communications*, 06-1 BCA at 164,916. Here, OST argues that it had no reason to know of AmeriTask's imminent overrun and that, as a result, its failure to provide notice is excused. It is OST's burden to show that the cost overruns were not reasonably foreseeable. *International Science & Technology Institute, Inc. v. United States*, 53 Fed. Cl. 798, 806 (2002), *aff'd*, 95 F.3d 398 (Fed. Cir. 2004) (table).

Here, OST argues that it could not have reasonably known of the imminent cost overruns from 2009 to 2013 because its subcontractor, not OST, was the source of the cost tracking problem. Yet, in 2010, OST was informed of potential AmeriTask underbillings of up to $950,000. A contractor has a "duty to maintain an accounting and financial reporting system to secure timely knowledge of probable overruns before costs are incurred" and "to properly evaluate the financial data" that the accounting system generates. *Advanced Materials*, 108 F.3d at 311; *see Consulting Services Corp.*, ASBCA 20288, 76-2 BCA ¶ 12,124, at 58,248; *Industrial Technological Associates, Inc.*, ASBCA 16075, 72-2 BCA ¶ 9531, at 44,388. Although the cost tracking problem here rested with OST's subcontractor rather than with OST's own accounting system, "prime contractors are ordinarily responsible for the unexcused performance failures of their subcontractors." *General Injectables & Vaccines, Inc. v. Gates*, 527 F.3d 1375, 1377 (Fed. Cir. 2008). When OST became aware of problems with AmeriTask's cost tracking in early 2010, it did not take immediate steps to expedite a solution to AmeriTask's problem but, instead, directed AmeriTask to engage auditors who took years to report their findings. During that time, OST never told FEMA

about the cost overruns yet kept billing (or underbilling) FEMA until it reached cost estimate funding ceilings. OST cannot claim ignorance of its subcontractor's billing problems when it had been told of them and was actively involved in attempting to direct a response.

OST also asserts that it could not report AmeriTask's overruns until auditors had completed their review of AmeriTask's records—a review that took several years—and had identified definite numbers that OST could relay to FEMA. Yet, OST knew in early 2010 that AmeriTask was underbilling and, by October 2010, that underbillings for 2009 and the first part of 2010 were somewhere between $750,000 and $950,000. OST did not inform FEMA of any underbillings until 2014, even though, between 2010 and 2014, it was continuing to submit monthly payment requests that, from what AmeriTask had told it, it knew were understated. "A contractor is not required to have exact knowledge of the extent of the cost overrun before it is obligated to give notice." *Industrial Technological Associates*, 72-2 BCA at 44,388-89. "[N]otice is required when the contractor 'has reason to believe' that it will exceed the estimated costs." *Titan Corp. v. West*, 129 F.3d 1479, 1481 (Fed. Cir. 1997); *see International Technology Corp.*, ASBCA 54136, 06-2 BCA ¶ 33,348, at 165,365; *J. J. Henry Co.*, ASBCA 13835, et al., 71-1 BCA ¶ 8898, at 41,347. OST has identified no basis for eliminating the contracting officer's ability to control costs or his contractual right, in response to a notice of an impending cost overrun, to elect to stop certain services.

In any event, even if OST could claim that it reasonably was unaware of the extent of AmeriTask's alleged underbillings, it would not matter in the circumstances here. We recognize that the Court of Claims in *General Electric Co. v. United States*, 440 F.2d 420 (Ct. Cl. 1971), held that a contracting officer "abuses his discretion" under the cost limitation clauses "if he refuses to fund a cost overrun where the contractor, through no fault or inadequacy on its part, has no reason to believe, during performance, that a cost overrun will occur and the sole ground for the contracting officer's refusal [to fund the overrun] is the contractor's failure to give proper notice of the overrun." *Id.* at 425. The Court of Appeals for the Federal Circuit subsequently clarified in *Advanced Materials, Inc. v. Perry*, 108 F.3d 307 (Fed. Cir. 1997), however, that the Government does not have to waive the cost estimate limitations following an untimely overrun disclosure if "the contractor's failure to give proper notice of the overrun was not 'the sole ground' for the contracting officer's refusal to fund it." *Id.* at 311. That admonition is consistent with the fact that, even when a contractor provides timely and proper notice of a projected overrun, it "does not require the contracting officer to take any action." *Applied Theory, Inc.*, ASBCA 49725, 97-1 BCA ¶ 28,670, at 143,191 (1996), *aff'd*, 152 F.3d 944 (Fed. Cir. 1998) (table). Timely notice "gives the contracting officer the opportunity to increase the estimated cost" but "does not require him to do so." *Id.*; *see Advanced Materials*, 108 F.3d at 310 (Timely notice "gives the government the choice whether to incur additional costs for the contract or to have the

contract terminated."). It would be strange if, as OST appears to argue, contractors who do *not* provide timely notice are automatically entitled to recover their excess costs when those who *do* provide timely notice cannot unless the contracting officer affirmatively grants it.

Here, in his final decision, the contracting officer stated that he was denying OST's cost overrun claim not only because of the lack of notice but also because (1) OST did not have sufficient data to show that the subcontract costs were allowable, reasonable, and allocable under the FAR; and (2) OST had failed to monitor its subcontractor to ensure that it had an acceptable accounting system that would report costs accurately during contract performance. Exhibit 38 at 3-4. The lack of notice was not "the sole reason" for the contracting officer's denial of OST's claim. Accordingly, the *General Electric* rationale for waiving the notice requirement does not apply. *See Advanced Materials, Inc.*, ASBCA 47014, 96-1 BCA ¶ 28,002, at 139,851 (1995) (approving cost overrun funding denial where the contracting officer's stated reason for denying funding was a lack of assurance that overrun costs were reasonable, allocable, and allowable), *aff'd*, 108 F.3d 307 (Fed. Cir. 1997). OST cannot rely on a lack of knowledge to avoid the notice requirements of the LOF and LOC clauses.

D. Summary of Cost Limitation Clauses Issues

Based upon its unexcused failure to provide timely notice under the LOF and LOC clauses, OST may not pursue claims for cost overruns in 2009, 2010, or 2013. The lack of notice does not affect OST's ability to seek costs incurred in 2011 and 2012, up to the amount of whatever estimated costs for those years have not yet been expended, except to the extent, as discussed below, that recovery of those costs is impacted by FEMA's other summary judgment arguments.

IV. The Effect of the CDA Statute of Limitations

Under section 7103 of the CDA, "[e]ach claim by a contractor against the Federal Government relating to a contract . . . shall be submitted within 6 years after the accrual of the claim." 41 U.S.C. § 7103(a)(4). The FAR defines accrual of a CDA claim as "the date when all events, that fix the alleged liability on either the Government or contractor and permit assertion of the claim, were known or should have been known." FAR 33.201. FEMA argues in its summary judgment motion that the entirety of OST's claim is barred by the CDA's statute of limitations. It asserts that "AmeriTask and [OST] were both aware of the alleged underbilling by May 26, 2011, at the latest" and that "[t]he earliest possible 'claim' submission date was more than six years later, i.e., by June 14, 2017." Respondent's Summary Judgment Motion at 7.

"[T]o determine when appellant's claims accrued, and the events that fixed the alleged liability, we start by examining the legal basis for each particular claim." *Crane & Co. v. Department of the Treasury*, CBCA 4965, 16-1 BCA ¶ 36,539, at 178,007 (quoting *Environmental Safety Consultants, Inc.*, ASBCA 54615, 07-1 BCA ¶ 33,483, at 165,984). "[W]here a claim is based upon a contractual obligation of the Government to pay money, the claim first accrues on the date when the payment becomes due and is wrongfully withheld in breach of the contract." *Oceanic Steamship Co. v. United States*, 165 Ct. Cl. 217, 225 (1964); *see Alder Terrace, Inc. v. United States*, 161 F.3d 1372, 1377 (Fed. Cir. 1998) ("Generally, '[i]n the case of a breach of contract, a cause of action accrues when the breach occurs.'" (quoting *Manufacturers Aircraft Association v. United States*, 77 Ct. Cl. 481, 523 (1933)). OST characterizes the Government's "breach" as its failure to pay invoices that were first presented to it with OST's June 14, 2017, certified claim and then resubmitted with the January 3, 2018, resubmitted claim. According to OST, its claim could not have accrued before it submitted the invoices on June 14, 2017.

"[I]t cannot be true that one who has a claim against another which he can perfect and make actionable by acts within his own power can keep the claim alive indefinitely by merely refraining from doing those acts"—that is, by failing to submit the necessary invoices. *Systems Management & Research Technologies Corp. v. Department of Energy*, CBCA 4068, 15-1 BCA ¶ 35,976, at 175,791 (quoting *Duhame v. United States*, 135 F. Supp. 742, 744 (Ct. Cl. 1955)). As we discussed in *Systems Management*, when evaluating the accrual date for a claim for unpaid money, we have to look at the language of the government contract at issue to determine if it obligated the contractor to demand payment of costs incurred by a particular deadline, a demand that would perfect the Government's obligation to pay. If the contract requires submission of an invoice for particular incurred costs by a particular deadline, the statute of limitations generally starts "to run, depending on the contract language, on or soon after [that] contractual deadline for invoicing." *Id.*; *see Johnson v. Columbia Properties Anchorage, LP*, 437 F.3d 894, 900-01 (9th Cir. 2006) (where the contract required that the invoice be sent "at the conclusion of the project," the statute of limitations began to run well before the contractor submitted an invoice for payment two-and-a-half years after the project conclusion). In certain circumstances, "a claim can accrue before the contractor ever submits an invoice to the Government." *Systems Management*, 15-1 BCA at 175,789.

FEMA argues that OST was required to include all costs in monthly invoices as they were incurred and that, when it was submitting its invoices, AmeriTask and OST should have known that the invoices, all of which FEMA paid, were understated, triggering the CDA statute of limitations. In considering FEMA's argument, we must evaluate the specific language of OST's contract. *Systems Management*, 15-1 BCA at 175,790. Here, that language obliges OST and AmeriTask to invoice all costs contemporaneously with their

incurrence. Under the terms of its subcontract, AmeriTask was required to submit monthly invoices in which it was to calculate the amount due "by multiplying the Fees by the Period for work performed" during that period. Exhibit 41 at 68. OST, in turn, would submit to FEMA "an invoice or voucher supported by a statement of the claimed allowable cost for performing this contract." FAR 52.216-7(a)(1). Because AmeriTask's monthly invoices were required to contain all costs that it had incurred during that period and because OST was required to forward those invoices to FEMA for payment, the statute of limitations for challenging the amount of the monthly payment in a pass-through claim like this one accrued each time that OST submitted AmeriTask's understated invoice and FEMA made the payment (or, as OST now calls it, the underpayment). *Cf. United Liquid Gas Co. v. General Services Administration*, CBCA 5846, 18-1 BCA ¶ 37,172, at 180,941 (finding that a government claim for overbilling accrued when the Government made the overpayment and could have, if it had tried, determined the overbilling from the base contract).

We reject OST's argument that the CDA statute of limitations could not have commenced until OST submitted the June 14, 2017, claim and invoices. It was only on that date, OST argues, that it could calculate a "sum certain" for AmeriTask's pass-through claim. To support its position, OST relies on the Federal Circuit's decision in *Kellogg Brown & Root Services, Inc. v. Murphy*, 823 F.3d 622 (Fed. Cir. 2016), where the Court asserted that "a 'claim' for 'the payment of money' does not 'accrue' until the amount of the claim, 'a sum certain,' FAR § 2.101, is 'known or should have been known,' *id.* § 33.201." *Kellogg Brown*, 823 F.3d at 627; *see id.* at 628 ("Accrual in accordance with FAR § 33.201 does not occur until [the contractor] requests, or reasonably could have requested, a sum certain from the government."). At least one court has held that the Federal Circuit's discussion in *Kellogg Brown* tying accrual to the ability to identify a "sum certain" was *dicta* and in conflict with existing court precedent. *Square One Armoring Services Co. v. United States*, 162 Fed. Cl. 429, 437-38 (2022). Even if not *dicta*, the holding is irrelevant here. AmeriTask should have known that its invoices were understated and by what amount when it submitted them to OST. In fact, beginning in early 2010, OST was expressly informed that AmeriTask was underbilling. Only OST and AmeriTask were in a position to prepare accurate invoices, and they cannot defer claim accrual by reference to their own failed accounting practices. *See Raytheon Missile Systems*, ASBCA 58011, 13 BCA ¶ 35,241, at 173,018 ("Accrual of a contracting party's claim is not suspended until it performs an audit or other financial analysis to determine the amount of its damages."). Because OST's contract and AmeriTask's subcontract, taken together, required AmeriTask to bill all costs in monthly invoices as the costs were being incurred, OST cannot rely on *Kellogg Brown* to excuse its and its subcontractor's failure to satisfy that obligation and to avoid accrual of the CDA statute of limitations.

FEMA argues that, because OST was aware by early 2010 that AmeriTask was underbilling and by October 2010 that the amount of the underbilling was substantial, the *entirety* of OST's claim for monies incurred in 2009 through 2013 is time-barred. Some of the costs of services for which AmeriTask seeks reimbursement, however, were incurred less than six years before OST submitted the claim at issue. As discussed above, when a claim accrues depends on the language of the contract. *Systems Management*, 15-1 BCA at 175,791. OST's contract provided that, after it submitted an invoice, FEMA would make payment. Each payment was, according to OST, too low. For each underpayment, the statute of limitations runs from the date of that underpayment. *See Todd Pacific Shipyards Corp.*, ASBCA 55126, et al., 11-1 BCA ¶ 34,759, at 171,087 (finding statute of limitations ran from the date that the Government was required but failed to pay in response to the invoice).

For the reasons discussed in the prior section, the only costs that remain available for potential recovery are those incurred in 2011 and 2012. The parties' briefing does not identify the dates upon which FEMA made what OST would now characterize as underpayments of AmeriTask's incurred costs or when the costs that OST is claiming were actually incurred. In further proceedings, the parties will have to calculate which costs in OST's claim are tied to each monthly underpayment and analyze whether they fall outside the CDA statute of limitations.

V. The Illegality of AmeriTask's Subcontract

A. The Nature of AmeriTask's Subcontract

As another basis for summary judgment, FEMA argues that OST's recovery is barred because the subcontract between OST and AmeriTask is an illegal CPPC contract.

By statute, the Federal Government is precluded from using "[t]he cost-plus-a-percentage-of-cost system of contracting." 41 U.S.C. § 3905(a). That prohibition extends to bar prime contractors from entering into CPPC subcontracts to support their prime contracts: "Where a subcontract violative of the prohibition [on CPPC contracts] is made—in whatever form or disguise—it is plainly invalid at least insofar as establishing an obligation on the Government to make reimbursement of an amount representing the subcontractor's claimed costs plus a percentage of such costs." *Urban Data Systems, Inc. v. United States*, 699 F.2d 1147, 1151 (Fed. Cir. 1983) (quoting 33 Comp. Gen. 533, 536 (1954)). Here, applying that prohibition, OST's prime contract incorporates the "Subcontracts (Jun 2007)" clause from the FAR, which provides that "[n]o subcontract or modification thereof placed under this contract shall provide for payment on a [CPPC] basis." FAR 52.244-2(g); *see* Exhibit 1 at 28.

OST argues that its subcontract with AmeriTask is not actually a CPPC contract but is instead a valid cost-plus-fixed-fee contract. The Federal Circuit has adopted the following four general criteria, originally developed by the Comptroller General, for analyzing whether a contract is a CPPC contract:

> (1) payment is on a predetermined percentage rate; (2) the predetermined percentage rate is applied to actual performance costs; (3) the contractor's entitlement is uncertain at the time of contracting and (4) the contractor's entitlement increases commensurately with increased performance cost.

Urban Data Systems, 699 F.2d at 1150 (citing 55 Comp. Gen. 554, 562 (1975)). Ultimately, though, "any contractual arrangement where the contractor is assured of greater profits by incurring additional costs will be held illegal." *United States ex rel. Patzer v. Sikorsky Aircraft Corp.*, 571 F. Supp. 3d 979, 987 (E.D. Wis. 2021) (quoting John Cibinic, Jr., Stephen D. Knight & Ralph C. Nash, Jr., *Cost Reimbursement Contracting* 42 (4th ed. 2014)). "The reason Congress prohibited this type of arrangement in government contracting is that it gives the supplier an incentive to drive up the government's costs: because the supplier's profit is determined by a percentage of its future costs, the supplier has an incentive 'to pay liberally for reimbursable items because higher costs mean[ ] a higher fee to him.'" *Id.* (quoting *Muschany v. United States*, 324 U.S. 49, 61-62 (1945)).

AmeriTask's subcontract defines the "fixed fee" as an add-on of "8.0 percent of total cost inclusive of general and administrative expenses." Exhibit 41 at 76. That language establishes a predetermined percentage rate, which (based upon the language of the subcontract) applies to actual performance costs, with the cost amount uncertain at the time of subcontracting and with AmeriTask's entitlement increasing commensurately as its total costs increase. That is the epitome of an illegal CPPC contract.

OST argues that, regardless of the language in the subcontract, the parties to the subcontract actually calculated AmeriTask's fee each year as a set figure approximately equaling 7.5% of what they originally expected AmeriTask to bill. As a result, OST argues (supported by a declaration from one of its fact witnesses) that the parties did not implement the CPPC aspect of the agreement. In interpreting a contract, however, we look to its plain language, as written, rather than to extrinsic evidence. *Foley Co. v. United States*, 11 F.3d 1032, 1034 (Fed. Cir. 1993). Interpreting the plain language of AmeriTask's subcontract, it is clear that the parties agreed to a fee based on a predetermined eight-percent rate, which was to be applied to the total cost of the project, not to a predetermined "estimated cost" that

OST now proposes.[3] It is "[t]he theoretical contravention of the prohibition" that "make[s] the arrangement illegal." *Urban Data Systems*, 669 F.2d at 1151 (quoting *Air Repair, G.M.B.H.*, ASBCA 10288, 67-1 BCA ¶ 6115 (1967)). "No showing of [an actual] unfair or inefficient increase in price or costs is necessary in order to render such a contract illegal." *Id.* Because AmeriTask's subcontract is, on its face, plainly a CPPC contract, neither OST nor AmeriTask, in seeking recovery from FEMA, is "entitled to enforcement of the provisions of the express, written [sub]contract . . . since those provisions are invalid as violative of the applicable procurement law." *Yosemite Park & Curry Co. v. United States*, 582 F.2d 552, 561 (Ct. Cl. 1978).

B. The Effect of the Illegality on OST's Recovery

Contrary to FEMA's position, the mere fact that AmeriTask's subcontract with OST is an illegal CPPC contract does not automatically dispose of OST's claim. If a contractor presents an otherwise valid claim under an illegal CPPC contract, the contractor "is entitled to a quantum meruit recovery for the reasonable value of the services received by" the Government. *Yosemite Park*, 582 F.2d at 560; *see Urban Data Systems*, 699 F.2d at 1154-55 (where the illegal CPPC contract was one for supplies, allowing for quantum valebant recovery). "[T]he reasonable value of the benefit received by the [Government]" does not necessarily equate with the costs that the contractor incurred and "may be shown to be less than the amount claimed." *Yosemite Park*, 582 F.2d at 561; *see Cities Service Gas Co. v. United States*, 500 F.2d 448, 457 (Ct. Cl. 1974) ("[V]alue determined on a quantum meruit basis . . . is not based on costs nor a reasonable return on investment of the seller, but on the reasonable value in the marketplace of the property sold."). If evidence shows that the value of AmeriTask's services to FEMA actually *exceeded* the "provable costs" that it incurred, OST's recovery on AmeriTask's behalf would still be limited to those "provable

[3] OST argues that dollar figures identified in an attachment to the subcontract, *see* Exhibit 41 at 78, set forth the "fixed fees" that AmeriTask would be paid, regardless of how many labor hour costs it incurred when performing. In reality, though, the dollar figures are those that AmeriTask would recover only if OST ordered the maximum number of labor hours that the subcontract permitted. *See id.* at 69 ("[I]n no event shall the fees payable to the Subcontractor on any task order exceed the designated maximum amount specified in each task order."). AmeriTask was not guaranteed the maximum number of labor hours or the maximum possible fee. For whatever labor hours AmeriTask billed, its fee was limited to "8% of total cost inclusive of general and administrative expenses," which is the epitome of a CPPC contract. *Id.* at 76. To the extent that a reference to a 7.5% fee in the subcontract attachment to which AmeriTask cites creates some kind of ambiguity in the subcontract, that ambiguity would relate to the amount of AmeriTask's fee markup entitlement, not the fact that the fee amount would be a percentage of actual costs incurred.

costs"—AmeriTask cannot recover more than it spent. *Yosemite Park*, 582 F.2d at 561; *see Alisa Corp.*, AGBCA 84-193-1, 94-2 BCA ¶ 26,952, at 134,218-19.

The dissent on this issue believes that we should seek briefing from the parties on an issue that they did not raise. Specifically, it questions whether, because the contractor-subcontractor agreement at issue here contains a severability clause, the parties can avoid a quantum meruit recovery by essentially reforming the subcontract to strike the percentage-of-cost fee payment obligation from that agreement and directing payment of the subcontractor's actual costs (plus OST's markups) but not the subcontractor fee. It is not clear that a pricing provision like AmeriTask's can be severed by striking out the illegal parts of the pricing scheme, even in a contract containing a severability clause. *See, e.g.*, *AMB Property, L.P. v. MTS, Inc.*, 551 S.E.2d 102, 104 (Ga. Ct. App. 2001). At least in some jurisdictions, "the severance of an essential term is not allowed, even where the contract contains a severance clause," *Super98, LLC v. Delta Air Lines, Inc.*, 309 F. Supp. 3d 1368, 1378 (N.D. Ga. 2018) (internal quotation marks and citation omitted), and "[t]he general rule is that price is an essential ingredient of every contract." *Echols v. Pelullo*, 377 F.3d 272, 275 (3d Cir. 2004) (citation omitted). In any event, the rules of severance make no difference here because "we have no jurisdiction to grant reformation of the terms of a subcontract." *Acquest Government Holdings, OPP, LLC v. General Services Administration*, CBCA 413, 08-1 BCA ¶ 33,720, at 166,971 (2007); *see MW Builders, Inc. v. United States*, 136 Fed. Cl. 584, 589 (2018) ("The court's equitable authority does not extend to reforming contracts between [a prime and its subcontractor]."); *George Hyman Construction Co. v. United States*, 30 Fed. Cl. 170, 175 (1993) ("Plaintiff has not cited, and the court has not found, any instance where this court has exercised authority to reform a private contract" between a prime and its subcontractor.), *aff'd*, 39 F.3d 1197 (Fed. Cir. 1994) (table). Because we lack authority to reform AmeriTask's subcontract in the manner that the dissent envisions, we see no need to require the parties to devote time and effort to research and brief a severability issue that they did not previously raise.

Accordingly, we grant summary judgment in FEMA's favor on the issue of whether AmeriTask's subcontract is a CPPC contract, but we deny its request to bar OST from any recovery because of the illegal nature of that subcontract. In further proceedings, OST will have to show that, for services provided in 2011 and 2012, FEMA paid less than the reasonable value of the services that OST and its subcontractor provided and that AmeriTask (and OST) suffered damage because of the underpayment.

Decision

FEMA's motion for summary judgment is **GRANTED IN PART**. OST's damages are limited to the amounts identified in the invoices that it submitted on June 14, 2017. Further, because recovery of costs incurred in 2009, 2010, and 2013 is barred by cost limitation clauses in the contract, OST cannot recover those costs. OST may pursue a quantum meruit recovery for services performed in 2011 and 2012 unless, in future proceedings, FEMA is able to establish that claims relating to services provided in 2011 and 2012 are partly or fully barred by the CDA statute of limitations.

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

I concur:

Allan H. Goodman
ALLAN H. GOODMAN
Board Judge

VERGILIO, Board Judge, concurring in part and dissenting in part.

I would deny all but two portions of the appeals (relating to the performance years nominally of 2011 and 2012) at this stage. I reach this result rather directly, without the dicta and various conclusions along the way to resolution of the panel. On their faces, the claims seek a sum certain. These claims have been properly certified and are properly before the Board. In summary, the contract was funded on a yearly basis. The agency paid the contractor the annually funded amount for all but the two years. The agency has no obligation to pay the contractor in excess of the funded amounts, such that there is no legal basis to award the contractor additional funds for the claims, except potentially years 2011 and 2012. Additional payment for those two years remains in dispute; resolution depends upon the further development and finalization of the record.

The existing record shows that, with the claim in 2017, the contractor initially invoiced (subsequently revised) for additional payment for the two years in question. The agency's failure to pay the amounts sought is the basis of the claim for payment. The

existing record does not demonstrate that the referenced funding clauses of the contract (e.g., Limitation of Funds, Limitation of Costs) prohibit or impact payment for these two years. Also, the claim filed in 2017, as applicable to contract years 2011 and 2012, satisfies the six-year statute of limitations requirements.

The contractor-subcontractor agreement appears to contain a severability clause, such that if a term is deemed to be invalid or unenforceable, the remainder of the agreement remains in full force and effect. The parties do not address this clause or its potential impact with respect to the alleged cost-plus-percentage-of-cost contract. I would not at this stage limit relief to a quantum meruit basis for the two years in dispute nor preclude relief under the actual terms and conditions of the contract and agreement. Moreover, if what the contractor contends is true, that the subcontractor received a fixed fee for each year of performance, there would be no basis to add a subcontractor fee amount to any relief substantiated for actually incurred, but unreimbursed, costs under the contract.

The majority reads more into my position than is stated. In its comments, the majority rejects the notion that the severability clause could potentially impact recovery under the claim. It provides its own analysis preempting the parties from addressing the issue. As stated above, I would not "at this stage limit relief" as does the majority. Moreover, I do not attempt to alter the agreement between the prime and the subcontractor but note that the agreement, with the severability clause, could be read to impact the agency's obligations for payment. That is, whatever the contractor may be obligated to pay the subcontractor under its agreement can be different from what the agency may have to pay the contractor.

Joseph A. Vergilio
JOSEPH A. VERGILIO
Board Judge