



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

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CROSS-MOTIONS FOR SUMMARY RELIEF DENIED: October 19, 2015

CBCA 2862, 4085, 4802

TURNER CONSTRUCTION COMPANY,

Appellant,

v.

SMITHSONIAN INSTITUTION,

Respondent.

Douglas Patin and Michael S. Koplan of Bradley Arant Boult Cummings LLP,
Washington, DC, counsel for Appellant.

Craig A. Holman and Kara L. Daniels of Arnold & Porter LLP, Washington, DC,
counsel for Respondent.

Before Board Judges **KULLBERG**, **WALTERS**, and **SULLIVAN**.¹

SULLIVAN, Board Judge.

The parties have filed cross-motions for summary relief. Appellant, Turner
Construction Company (Turner), asks the Board to find four of respondent's affirmative

¹ A panel comprised of Judges Somers, McCann, and Kullberg was originally
assigned to hear these appeals. The appeals were transferred to Judge Sullivan on December
17, 2014. Upon the retirement of Judge McCann, Judge Walters was assigned to the panel.

defenses insufficient as a matter of law.² Respondent, Smithsonian Institution (Smithsonian), moves for summary relief on Turner's entire claim, on various bases. For the reasons that follow, the Board is unable to grant any of the relief sought and denies the cross-motions.

Statement of Facts

With their motions, the parties have filed lengthy statements of proposed uncontroverted fact and responses thereto. The Board sets forth here only the facts and background necessary to decide the pending motions.

I. Turner's 2011 Claim and First Appeal (CBCA 2862)

A. Turner's contracts and claims

As discussed in our previous decision in this matter, Smithsonian contracted with Turner to provide various design and construction services in a long-term, multiple-phase project entitled "Public Space Renewal Project at the National Museum of American History." *Turner Construction Co. v. Smithsonian Institution*, CBCA 2862, 13 BCA ¶ 35,290, at 173,252. The contract between Turner and Smithsonian, by its terms, is not subject to the Contract Disputes Act. Exhibit 1 at 320.³ Instead, the Disputes clause of the contract provides that a contractor may appeal a contracting officer's decision to the Secretary of the Smithsonian Institution. *Id.* at 321. By memorandum of agreement between Smithsonian and the Board, entered June 5, 2012, the Board has agreed to hear and decide the appeals arising from this contract. *Turner Construction*, 13 BCA at 173,258.

In its 2011 claim, Turner sought \$14,527,695 allegedly incurred for undefinitized work for which it was not paid. Exhibit 41 at 35.⁴ Approximately half the costs sought are subcontractor pass-through claims and the other half are Turner's costs. Exhibit 41 at 652. Most of the claim is for construction costs, although Turner does seek a small amount of costs arising from the design effort on the contract. *Id.* Turner stated in its claim to the

² Turner originally sought summary relief on five of Smithsonian's affirmative defenses, but withdrew the fifth at oral argument convened on September 28, 2015. Transcript at 104.

³ All exhibits are found in the appeal file, unless otherwise noted.

⁴ In March 2014, Turner revised this amount downward to \$14,094,978. Exhibit 233 at 2.

contracting officer that it was “not making a total cost claim.” Exhibit 41 at 35. The contracting officer denied Turner’s claim because it was “premised on the legal position that Turner’s design build contract was cost reimburseable,” a position that Smithsonian rejected. Exhibit 42 at 1. On June 14, 2012, Turner appealed that decision to the Board, which docketed the appeal as CBCA 2862.

Smithsonian’s motion relies, in part, upon the paragraph of the Equitable Adjustment clause that governs claims for delay. That clause limits the remedies available to address claims of delay:

The Contractor shall not be entitled to any amount for indirect costs, damages or expenses of any nature, including, but not limited to, so-called impact costs, labor inefficiency, wage material or other escalations beyond the prices upon which the proposal is based and which are identified pursuant to this Clause, and which the Contractor, its Subcontractors or Suppliers may incur as a result of delays, interference, suspensions, changes in sequence or the like, from whatever cause, whether reasonable or unreasonable, foreseeable or unforeseeable, or avoidable or unavoidable, arising from the performance of any and all changes in the Work performed pursuant to this Clause. It is understood and agreed that the Contractor’s sole and exclusive remedy in such event shall be recovery of his costs and specified markups for overhead, profit and/or commission as set forth in this Clause and an extension of the Contract Time, but only in accordance with the provisions of the Contract Documents.

Exhibit 1 at 275 (SI 252.243-71(a)(11)).

The Changes clause of the contract provides that Turner was to provide notice to Smithsonian of any perceived change to the contract and seek an adjustment within thirty days of receiving direction regarding a change to the contract:

(e) The Contractor must assert its right to an adjustment under this clause within 30 days after:

(1) receipt of a written change order under paragraph (a) of this clause, or

(2) the furnishing of a written notice under paragraph (b) of this clause, by submitting to the Contracting Officer a written statement describing the general nature and amount of the

proposal, unless this period is extended by the Government. The statement of proposal for adjustment may be included in the notice under paragraph (b) above.

Exhibit 1 at 269 (48 CFR 52.243-4 (1987) (FAR 52.243-4)).

B. Subcontractors' contracts and claims

Turner presents claims of five of its subcontractors, Welch and Rushe, March-Westin, APRO, M.C. Dean, and Coakley, for the costs of "impact and delay" arising during contract performance. Exhibit 41. Turner applied its general conditions mark up to these claims. Exhibit 233.

Smithsonian has submitted as part of the record lien releases and change orders executed by each of these subcontractors during the period of contract performance. The lien releases contain the following language:

The undersigned has received payment in full for all deliveries of material to and/or for all work performed in connection with the construction of the project through the date of the [Turner] Application for payment . . . and hereby represents and warrants that there are no outstanding claims by the Company in connection with the project through the date of the Application . . . except for any retention, pending modifications and changes, or disputed claims for extra work as stated herein

See, e.g., Exhibit 427 at 1. The change orders contain the following language:

Through acceptance of this Change Order, this Subcontractor acknowledges that it has reviewed the progress of the Work related to this Project and the potential time impact of the added work on the progress of the project in the future. As a result, this Change Order includes compensation to the Subcontractor for any and all effects, delays, inefficiencies or similar demands associated with this Project and the Subcontractor recognizes that there is no basis for any such claim in the future.

See, e.g., Exhibit 103 at 1.

In its motion, Smithsonian also relies upon a provision of Turner's subcontracts that governs claims for delay. That provision limits the remedies available to address claims of delay:

The Subcontractor agrees it shall not be entitled to nor claim any cost reimbursement, compensation or damages for any delay, obstruction, hindrance or interference to the Work except to the extent that Turner has actually recovered corresponding cost reimbursement, compensation or damages from the Owner under the Contract Documents for such delay, obstruction, hindrance or interference

See e.g., Exhibit 45 at 7 (Turner subcontract Art. V).

II. The Board's 2013 Decision

Following the filing of Turner's first appeal, the parties filed cross-motions for summary relief. Turner alleged that Smithsonian's failure to negotiate a fixed price for the contract and definitize all of the work constituted a breach of contract by Smithsonian. Smithsonian argued that Turner, with its appeal, sought to transform the nature of the contract from a firm, fixed-price contract to a cost-reimbursement contract, which it could not do.

The Board granted Turner's motion in part. *Turner Construction*, 13 BCA at 173,260. While the Board held that the inability of the parties to negotiate a firm, fixed-price did not constitute a breach of contract, the Board did find that the parties had not agreed upon a fixed contract price. *Id.* at 173,259. The Board denied Smithsonian's motion, finding that Turner's request for its undefinitized costs did not transform the contract into a cost-reimbursement contract. *Id.* at 173,260. The Board held that Turner "is entitled to be paid a reasonable amount for the work it performed on the project," *id.*, and left to future proceedings the determination of what that amount should be.

III. 2014 Contracting Officer's Decision and Turner's Second Appeal (CBCA 4085)

A. Smithsonian's audit

Following issuance of the Board's 2013 decision, Smithsonian sought to audit Turner's claim. The contract contains an audit provision which requires Turner to maintain records related to the contract and permit Smithsonian access to those records if there is a dispute concerning pricing on the contract:

121. SI [SMITHSONIAN INSTITUTIONS] RIGHT TO AUDIT AND PRESERVATION OF RECORDS (JUNE 2000)

(a) The Contractor shall maintain books, records and accounts of all costs in accordance with generally accepted accounting principles and practices. The S.I. or his authorized representatives shall have the right to audit the books, records and accounts of the Contractor under any of the following conditions:

...

(2) In the event of a disagreement between the Contractor and the S.I. over the amount due the Contractor under the terms of this Contract[.]

Exhibit 1 at 286. The clause further provided that Turner was to maintain the records and make them available for three years following final payment under the contract:

(c) Unless otherwise provided by applicable statute, the Contractor, from the effective date of final payment or termination hereunder, shall preserve and make available to the S.I. for a period of three (3) years thereafter, at all reasonable times at the office of the Contractor, but without direct charge to the S.I., all its books, records, documents, and other evidence bearing on the costs and expenses of the Contractor under this Contract and relating to the Work hereunder.

Id. Finally, the provision requires Turner to reimburse Smithsonian if the audit reveals an overpayment on the contract:

(e) If any audit by the S.I. or its representative discloses an underpayment by the S.I. pursuant to the terms of the Contract Documents, the S.I. shall have the duty to pay any amounts found by the audit to be owed to the Contractor. If such audit discloses an overpayment, the Contractor shall have the obligation to reimburse the S.I. for the amount of the overpayment.

Id. at 287.

In a report dated June 2, 2014, Smithsonian's auditors offered the opinion that Turner had not "substantiated all of the contractual costs it has presented related to the [contract]" and the auditors "questioned \$40,480,621 of the costs that are not adequately supported in

accordance with Turner's contract with SI or with the [Federal Acquisition Regulation (FAR)]." Exhibit 236 at 4. The auditors provided a list of fifteen items that were noted during the audit, including Turner's failure to segregate its definitized and undefinitized costs at the time they were incurred; Turner's purported failure to maintain supporting costs documentation; Turner's failure to follow "required source selection procedures"; and Turner's claim for unallowable general conditions costs. *Id.* at 4-6.

B. Contracting Officer's decision denying claim and seeking repayment

On July 28, 2014, the contracting officer issued a decision finding that Turner had been overpaid on the contract \$24,517,558, "based upon Turner's noncompliance with the Contract terms and other improper billings." Exhibit 237 at 1. The contracting officer recited a similar list of issues found by its auditors regarding Turner's claim and cost documentation. *Id.* at 1-2. Invoking the audit provision of the contract, the contracting officer issued a demand for repayment of this amount and affirmed her denial of Turner's original claim in the amount of \$14,094,978. *Id.* Turner appealed this decision to the Board on August 25, 2014. That appeal was docketed as CBCA 4085 and consolidated with the original appeal.

C. Smithsonian's affirmative defenses and Turner's motion

Smithsonian amended its answer in the pending appeal to assert as affirmative defenses many of the same issues identified by the auditors and adopted by the contracting officer as the basis for seeking repayment. Turner seeks summary relief on four of these affirmative defenses. At argument, Turner's counsel acknowledged that none of these affirmative defenses is the sole basis for Smithsonian's seeking repayment of any particular group of costs. Transcript at 39-40. So, even if the Board were to grant summary relief on one or more of its grounds, Smithsonian would still be seeking repayment of the entire amount.

IV. Turner's 2015 Claim and Third Appeal (CBCA 4802)

Turner's 2015 claim sought costs incurred to address the continuing problems Smithsonian was experiencing in maintaining proper humidity levels at the museum. By letter dated January 21, 2010, Smithsonian advised Turner that the required humidity levels were not being maintained in the winter heating seasons and that Smithsonian planned to hire a third-party contractor to review the system to determine the cause of the problem. Exhibit 274. After several exchanges regarding who would hire the third-party contractor, Exhibit 276-281, Turner hired AECOM to conduct the investigation. Exhibit 287. AECOM's

evaluation appears to have proceeded over a period of two years and Smithsonian was kept apprised of the investigation, with Smithsonian often inquiring as to the status of AECOM's efforts. *See, e.g.*, Exhibit 300.

AECOM issued a report regarding its evaluation in April 2011. Exhibit 294. Smithsonian contends that AECOM "verified the existence of a deficiently designed humidification system" and "concluded that the humidification system was flawed." Respondent's Proposed Facts ¶ 241. As support for this proposed finding, Smithsonian cites deposition testimony of Turner's program manager, Stephen Quick, and AECOM's report, but Smithsonian's proposed finding is not supported by these documents. In the cited testimony, Mr. Quick only agreed that "AECOM verified there was a humidification problem." Respondent's Motion, Exhibit 21 (Deposition of Stephen Quick (July 24, 2015) at 207). In the cited pages of the AECOM report, the Board does not find any statements that the design of the system was deficient or flawed. Exhibit 294 at 7. Instead, AECOM states that it "did not find any major issues in regards to the humidification system design." *Id.* Without further explanation as to AECOM's findings, the Board is unable to conclude that AECOM determined that the design was flawed.

Turner disputes that the inability to maintain proper humidity levels was caused by a deficient design. Appellant's Response at 59-60. Instead, Turner contends that the problems were caused by Smithsonian "not operating the system as designed and manually overriding various controls of the system, not conducting proper maintenance of the steam generator as well as propping open main entrance doors." Appellant's Response, Exhibit 7 (Declaration of Mr. Quick (Sept. 21, 2015) ¶ 22). According to Mr. Quick, he advised Smithsonian of these causes. *Id.* (citing Exhibit 301).

On May 7, 2012, Turner sent a letter to Smithsonian, advising that Turner and AECOM had still not determined the cause of the problem and recommending that Turner implement the recommendations made by AECOM. Exhibit 301. With this letter, Turner sought Smithsonian's "acceptance of this proposed approach." *Id.* at 3. Turner further advised that it would "address the cost of this issue when final closeout of the project has been achieved." *Id.* at 4.

By letter dated June 12, 2012, Smithsonian responded to Turner's May 7, 2012, letter and stated that Smithsonian "agrees with the approach you suggested and recommend[s] that you proceed with the design work." Exhibit 302. Although Smithsonian stated that Turner "should provide a cost proposal for the design and installation of this work," Smithsonian also noted its position that Turner was responsible for all of the costs of the work because the contract was a design build contract and "Turner is entirely responsible for the success of its

own design and installation.” *Id.* In a letter dated June 13, 2012, Turner thanked Smithsonian for its response and characterized that response as “direction to proceed.” Exhibit 303. According to Smithsonian, Turner did not provide a change order request for this work until October 16, 2013, although Smithsonian states it has no record of receiving this change order request until it was provided as an attachment to Turner’s claim. Respondent’s Motion at 50.

By letter dated May 6, 2015, Turner submitted a claim to the contracting officer for the costs incurred to install these additional systems in the amount of \$438,668. Exhibit 309. The contracting officer, by decision dated June 1, 2015, denied the claim for two reasons. Exhibit 310. One, the contracting officer maintained that Turner was responsible for the costs sought because the work was undertaken to correct a flawed design, a design that Turner was obligated to provide. Two, the contracting officer deemed the claim untimely because Turner had not complied with the notice provisions of the Changes clause. *Id.*

On June 15, 2015, Turner appealed the contracting officer’s decision to the Board. That appeal was docketed as CBCA 4802 and consolidated with the other pending appeals.

Discussion

I. Standard of Review

Summary relief is appropriate when the moving party is entitled to judgment as a matter of law, based upon undisputed material facts. *URS Energy & Construction, Inc. v. Department of Energy*, CBCA 3632, 15-1 BCA ¶ 35,949, at 175,683. The moving party bears the burden of demonstrating the absence of genuine issues of material fact and all justifiable inferences must be drawn in favor of the non-movant. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986). A material fact is one that will affect the outcome of the case. *Anderson*, 477 U.S. at 247. “[T]he party opposing summary judgment must show an evidentiary conflict on the record; mere denials or conclusory statements are not sufficient.” *Mingus Constructors, Inc. v. United States*, 812 F.2d 1387, 1390-91 (Fed. Cir. 1987). When both parties have moved for summary relief, each party’s motion will be evaluated on its own merits and all reasonable inferences must be resolved against the party whose motion is under consideration. *URS Energy & Construction*, 15-1 BCA at 175,684. “The mere fact that both parties have moved for summary relief does not impel the grant of one of the motions.” *Id.*

“Allegations without support are not evidence.” *McAllen Hospitals LP v. Department of Veterans Affairs*, CBCA 2774, et al., 14-1 BCA ¶ 35,758, at 174,970 (quoting *Castle*,

AGBCA 97-128-1, 97-1 BCA ¶ 28,833)). At the summary relief stage, the Board may not make determinations about the credibility of witnesses or the weight of the evidence. *Anderson*, 477 U.S. at 249.

II. Smithsonian has Failed to Establish that It is Entitled to Judgment as a Matter of Law

A. The claims of Turner's subcontractors are not barred

1. The Equitable Adjustment clause does not preclude all claims for delay

Smithsonian advances four bases for its motion seeking summary relief on the claims of Turner's subcontractors. Smithsonian first argues that the delay provisions of the Equitable Adjustment clause preclude the claims of delay advanced by both Turner and its subcontractors. Respondent's Motion at 31-32. Turner, in response, asserts that the clause, if it applies, does not preclude the damages sought by its subcontractors. Appellant's Response at 32.

Smithsonian urges an interpretation of the delay provision of the Equitable Adjustment clause that is not supported by the language of the provision. While the clause limits the remedies available for delay to "costs and specified markups for overhead, profit and commission," it does not preclude delay claims in their entirety, as Smithsonian would have the Board find. Because the elements of the subcontractors' delay claims have not been examined yet by the Board, we are not able to determine that the type of costs sought would be precluded by the delay provisions. Smithsonian has not established that the claims of Turner's subcontractors are precluded as a matter of law by the operation of the language of the Equitable Adjustment clause.

2. Disputed facts preclude summary relief based upon releases

Smithsonian next argues that each of Turner's subcontractors signed change orders and lien releases during the period of performance in which they released the claims that Turner now asserts against Smithsonian. Respondent's Motion at 34-41. Because the subcontractors allegedly waived all claims against Turner with these releases, Smithsonian argues that the *Severin* doctrine bars the presentation of a claim against Smithsonian. *Id.* at 33 (citing *Severin v. United States*, 99 Ct. Cl. 435 (1943)).

The *Severin* doctrine "relieves the Government from responsibility for a subcontractor's claim unless the prime contractor is also responsible to pay the subcontractor." *Hedlund Construction, Inc. v. Department of Agriculture*, CBCA 105, 08-1

BCA ¶ 33,798, at 167,317. When a contractor executes a release that is complete on its face and reflects the contractor's unqualified acceptance and agreement with its terms, the release will be binding on both parties. *Turner Construction Co. v. General Services Administration*, GSBCA 15502, et al., 05-1 BCA ¶ 32,924, at 163,097. "If the provisions of a release are 'clear and unambiguous, they must be given their plain and ordinary meaning.'" *Holland v. United States*, 621 F.3d 1366, 1378 (Fed. Cir. 2010) (quoting *Bell BCI Co. v. United States*, 570 F.3d 1337, 1341 (Fed. Cir. 2009)). However, there are "special and limited situations" in which a claim will survive the execution of a general release. *J.G. Watts Construction Co. v. United States*, 161 Ct. Cl. 801, 806 (1963) (per curiam). These limited circumstances are (1) mutual mistake, (2) conduct of the parties in continuing to consider the claim after the execution of the release, (3) claim was included in release by mistake or oversight, or (4) evidence of fraud or duress. *Id.* at 806-07. "Boards of contract appeals have consistently reviewed assertions by contractors that notwithstanding unambiguous releases in contract modifications, claims should be considered on their merits because the release language did not represent the parties' intentions." *Walsh/Davis Joint Venture v. General Services Administration*, CBCA 1460, 11-2 BCA ¶ 34,799, at 171,262.

Turner explains that the release language of the lien releases, change orders, and subcontracts was intended to protect Turner from independent liability to subcontractors, not to bar the subcontractors from submitting pass-through claims for change orders, delays, or impacts caused by Smithsonian. Appellant's Response at 28-29. Turner states that it continued to negotiate with the subcontractors regarding their impact claims throughout contract performance. *Id.* at 39 (citing Deposition of Christian E. Jahrling (July 22, 2015)). Further, Turner notes that some of the releases contained exceptions which did not waive all claims and that even after executing the relevant releases, it continued to negotiate with and pay its subcontractors. Appellant's Response at 29, 39; Appellant's Statement of Genuine Issues at 54.

With its response, Turner has presented sufficient evidence to defeat Smithsonian's arguments regarding the legal import of the releases. The Board will await the presentation of evidence surrounding the parties' intentions regarding the scope of the subcontractor releases and whether the conduct of the parties indicates that there was no intent to release the claims against Smithsonian.

3. Article V of Turner's subcontracts is not a bar to claims

Smithsonian also asserts that article V of Turner's contracts with its subcontractors precludes the presentation of the subcontractors' delay claims. Respondent's Motion at 42. Smithsonian argues that this provision exonerates Turner from any liability for inefficiency

and delay claims raised by its subcontractors and limits the remedy to an extension of time. Because Turner is not liable to its subcontractors for these claims, Smithsonian argues, the *Severin* doctrine would bar the presentation of these claims to Smithsonian. *Id.* at 44.

In response, Turner explains that the subcontractor claims are not precluded by *Severin* because article V creates potential liability to Turner since Turner remains liable to its subcontractors for amounts it recovers from Smithsonian. Appellant's Response at 40, 55.

The *Severin* doctrine is "to be construed narrowly." *Acquest Government Holdings, OPP, LLC v. General Services Administration*, CBCA 413, 08-1 BCA ¶ 33,720, at 166,969 (2007). "[W]hen the prime contract contains a remedy-granting clause, the prime contractor is allowed to sponsor a claim on behalf of its subcontractor against the Government if the subcontractor has suffered damages because of the Government's action under that clause, as long as the subcontract does not immunize the prime contractor completely from such liability or the subcontractor has not provided the prime contractor an iron-clad release from liability." *Id.* at 166,969 (citing *J.L. Simmons Co. v. United States*, 304 F.2d 886, 888-89 (Ct. Cl. 1962)). The Government bears the burden of proving the existence of an iron-clad release. *Metric Constructors, Inc. v. United States*, 314 F.3d 578, 582 (Fed. Cir. 2002).

Article V of Turner's subcontracts limits the recovery of delay damages by its subcontractors to those damages that Turner recovers from Smithsonian. Rather than absolving Turner of all liability, this provision requires Turner to pursue its subcontractors' claims and pay any recovery it receives in connection to those claims to its subcontractors. Turner is not absolved of liability for the subcontractors' claims and the *Severin* doctrine does not bar Turner's subcontractors' pass-through claims. *Acquest Government Holdings*, 08-1 BCA at 166,971.

4. Smithsonian has not established the existence of concurrent delays sufficient to defeat the subcontractors' claims of delay

Finally, as a fourth basis for seeking to preclude the claims of Turner's subcontractors, Smithsonian alleges that Turner cannot establish the critical path delay necessary to recover because there is evidence of concurrent delays for which Turner's subcontractors cannot assign responsibility. Respondent's Motion at 44-49. Based upon all of this purported evidence, Smithsonian seeks summary relief because Turner cannot establish that Smithsonian is the sole cause of any of the delay.

Turner, in response, offers the declaration of its schedule expert, who states that he has examined the instances of delay cited by Smithsonian and finds none to be on the critical path he has identified. Appellant's Response at 22-23.

To recover for delay, Turner "must establish the extent of the delay, [Turner's] harm resulting from the delay, and the causal link between the [Smithsonian's] wrongful acts and the delay." *Essex Electro Engineers, Inc. v. Danzig*, 224 F.3d 1283, 1295 (Fed. Cir. 2000) (citing *T. Brown Constructors, Inc. v. Pena*, 132 F.3d 724, 734 (Fed. Cir. 1997)). Turner also "must separate government-caused delays from its own delays." *Sauer Inc. v. Danzig*, 224 F.3d 1340, 1348 (Fed. Cir. 2000) (citing *T. Brown Constructors*, 132 F.3d at 734-35); see also *Commerce International Co. v. United States*, 338 F.2d 81, 89-90 (Ct. Cl. 1964).

Smithsonian is correct that the delays alleged must be parsed and traced to determine their cause and to ensure that Smithsonian is responsible. This analysis is an inherently factual inquiry, one that the Board cannot carry out based upon the briefing and evidence set forth by the parties. Smithsonian alleges periods of delay, but does not provide undisputed facts to establish the periods or that they were concurrent with the delays alleged by Turner. Smithsonian has not presented sufficient basis for summary relief on this basis; this issue too must await the presentation of evidence by the parties at the hearing.⁵

⁵ Turner, in briefing on this issue, argued that it need not demonstrate critical path delay because the parties never agreed upon a firm, fixed-price. Because of the absence of this firm, fixed-price, Turner contends it is entitled to the costs of delay regardless of whether there were concurrent delays. Appellant's Response at 25; see also Exhibit 41 at 24 (assertion in claim to contracting officer that Turner "is entitled to recover all reasonable, uncompensated general conditions required to complete the contract without proof that the delays were compensable because the vast majority of the contract was not definitized.") The Board disagrees. The fact that the parties never agreed upon a firm, fixed-price does not relieve Turner of its burden to establish the length and cause of any delays alleged. The parties agreed upon a completion date, through extensions, a date that Turner met. If Turner incurred additional costs as a result of actions or inactions by Smithsonian that caused delays, it may recover those costs. But, Turner must establish that Smithsonian is the cause of those delays and that there were no concurrent delays.

B. Smithsonian is not entitled to summary relief on Turner's 2015 claim

1. Turner's claim was not untimely

Smithsonian seeks summary relief on Turner's 2015 claim on two grounds. One, the claim is untimely based upon the notice provisions of the Changes clause. Two, Turner seeks compensation for faulty design work for which it was responsible under the original contract.

According to Smithsonian, the order to proceed with the additional work to address the humidity levels was given on June 12, 2012, so Turner was required to seek an adjustment to the contract no later than July 12, 2012. Respondent's Motion at 49-50. Turner responds that the additional work did not constitute a change to the contract – it was part of the undefinitized work for which Turner now seeks reasonable payment – and Smithsonian has not shown how it was prejudiced by Turner's failure to comply with the time limit. Appellant's Response at 60-61.

As noted above, the contract contained a Changes clause that required Turner to submit its notice of a right to adjustment under the contract within thirty days of receiving direction to proceed with a change. Failure to comply with the time limits in the Changes clause has been a bar to claims when a contractor remains silent as to its belief that it should receive an adjustment to the contract when given direction regarding a purported change to the contract requirements. *K-Con Building Systems, Inc. v. United States*, 778 F.3d 1000, 1009-10 (Fed. Cir. 2015). "Where contractor silence would foreclose less costly alternative solutions or the ability of the Government to avoid contractor claims, timely notice is required." *Calfon Construction Inc. v. United States*, 18 Cl. Ct. 426, 439 (1989). However, "extenuating circumstances" can weigh "against strict enforcement of the time limit." *K-Con Building Systems*, 778 F.3d at 1010. Such circumstances include that the contracting officer has actual or imputed knowledge of the claim or that giving notice would have been useless. *Powers Regulator Co.*, GSBCA 4668, et al., 80-2 BCA ¶ 14,463, at 71,320.

Turner's failure to give complete notice regarding its claim does not render its claim untimely. As detailed above, Turner sought Smithsonian's approval of the proposed work, although it did not provide a price for that effort. So, Smithsonian was on notice regarding the proposed additional work to the humidification system. Smithsonian approved Turner's proposal to move forward with the proposed changes, although Turner's proposal did not include a price. Smithsonian took the position at the time that the work was Turner's responsibility because the continuing problems were the result of a faulty design, rather than a change to the scope of the contract. Smithsonian reiterates that position in its motion. It appears, therefore, that Smithsonian would not have changed its course of action if Turner

had provided a price, so giving proper notice would not have changed the course of proceedings. Turner's failure to follow the requirements of the Changes clause does not render its claim untimely.

2. The cause of the additional work remains a disputed issue of fact

Smithsonian also seeks a determination that Turner must bear the costs of the additional work because it was caused by a flaw in the design of the system, a design for which Turner bears responsibility. Respondent's Motion at 50-52. Because Turner bears the responsibility for the design and for costs incurred to address flaws in the design, Smithsonian contends that Turner cannot recover the costs that are the subject of its 2015 claim.

Turner disputes that the additional work was required to address a design flaw. With the affidavit of Mr. Quick, Turner contends that the system was not operating correctly because Smithsonian was not operating the system correctly. Appellant's Response, Exhibit 7, ¶ 22. According to Mr. Quick, Turner sought to investigate the problems but acquiesced to Smithsonian's demand that additional components be installed to address the problems.

The Board denies Smithsonian's motion for summary relief on this issue. Turner disputes with sworn testimony the contention that the additional work was necessary as the result of a design flaw, and asserts that Smithsonian has not established that the design was flawed. There is a disputed material fact regarding why the additional work was necessary. The Board must resolve this issue on the basis of witness testimony and evidence to be presented at the hearing.

C. Smithsonian is not entitled to summary relief on Turner's 2011 claim

1. Turner is not relying upon the total cost claim method

Smithsonian also contends that Turner's claims are formulated using a total cost claim approach and Turner cannot meet the requirements for the use of total cost claim to prove its damages. Before a party may employ the total cost method to prove its claims, a party must prove four elements: (1) the impracticality of proving its actual losses directly; (2) the reasonableness of its bid; (3) the reasonableness of its actual costs; and (4) lack of responsibility for the added costs. *Propellex Corp. v. Brownlee*, 342 F.3d 1335, 1339 (Fed. Cir. 2003) (citing *Servidone Construction Corp. v. United States*, 931 F.2d 860, 861 (Fed. Cir. 1991)). Smithsonian asserts that Turner's claim must fail as a matter of law because Turner cannot meet prongs one and four of the required elements.

Turner, in response, states it does not intend to rely upon a total cost claim approach, and such an approach is not appropriate or even possible in this case because the parties did not establish a final definitized price. Appellant's Response at 8-9. Without such a final, fixed-price, Turner acknowledges it cannot demonstrate that it had a reasonable bid price, the second prong of the test. *Id.* at 9.

Turner's response renders the issue moot. Turner does not intend to use a total cost approach to proving its damages in this case. The Board need not decide whether such an approach is merited or appropriate.

2. Smithsonian has not established that Turner failed to maintain cost records as required by the contract

As its final basis for seeking summary relief, Smithsonian asserts that Turner failed to maintain and produce the documents requested by Smithsonian's auditors to support the costs claimed. Respondent's Motion at 98. This alleged failure requires the denial of Turner's claim and repayment of costs that Turner could not substantiate. *Id.*

Smithsonian relies upon the audit provision of the contract as the basis for its demand. As noted, that provision requires "[t]he Contractor shall maintain books, records, and accounts of all costs in accordance with generally accepted accounting principles and practices . . . the Contractor shall preserve and make available to the S.I. for a period of three years . . . all books, records, documents . . . relating to the Work hereunder." Smithsonian also relies upon the provision of the FAR that requires a contractor to maintain and provide adequate documentation of its costs:

A contractor is responsible for accounting for costs appropriately and for maintaining records, including supporting documentation, adequate to demonstrate that costs claimed have been incurred, are allocable to the contract, and comply with applicable cost principles in this subpart and agency supplements. The contracting officer may disallow all or part of a claimed cost that is inadequately supported.

FAR 31.201-2(d).

Based upon these provisions, Smithsonian asserts that "Turner's failure to provide complete responses to the auditors' requests for documents in support of the undefinitized amounts invoiced and additional amounts claimed, requires a denial of Turner's claim and a counterclaim for overpayment." Respondent's Motion at 99. Smithsonian further states

that “[a]lthough Turner made available to the Smithsonian Auditors certain of its procurement files, accounting reports, and subcontract agreements, Turner did not produce many of the relevant documents that the Smithsonian requested, including those bearing on the undefinitized costs claimed and invoiced.” Respondent’s Proposed Findings ¶ 101.

Turner disputes these proposed facts and explains that it provided documents in response to the auditors’ requests, although some of the responses were not complete. Appellant’s Statement of Genuine Issues at 31-32. Turner asserts that it has provided “ample documentation of its costs, including records from its subcontractors.” Appellant’s Response at 62. Turner has provided the declaration of its accounting expert, in which the expert opines that he “would have been satisfied with the access to the records provided. The records provided are typical documents provided and would form a reasonable basis for this type of audit.” *Id.*

The Board cannot resolve this issue on a motion. Smithsonian asserts that Turner has failed to maintain and produce documents that support its costs, as required by the audit provision and FAR part 31, but Smithsonian has not established what records Turner was obligated to maintain pursuant to the terms of the contract. Smithsonian only asserts that Turner failed to provide complete responses or “relevant” documents in response to its auditors’ requests. Respondent’s Motion at 99; Respondent’s Proposed Findings ¶ 101. Smithsonian has not established exactly what cost records Turner was required to maintain or that Turner, in fact, did not maintain those cost records. Instead, Smithsonian asks the Board simply to accept the auditors’ determination that Turner did not provide all relevant documentation and, therefore, Turner has failed to meet its obligations under the contract’s audit provision. The audit provision requires Turner to maintain records “in accordance with generally accepted accounting principles,” but Smithsonian has not established what those principles require regarding the maintenance of cost records.

In briefing and at argument, Smithsonian argued that the Board should be guided by the Federal Circuit’s decision in *JANA, Inc. v. United States*, 936 F.2d 1265 (Fed. Cir. 1991), a decision in which contractor’s costs were disallowed when it could not produce required supporting documentation. In *JANA*, the contract specifically required the contractor to maintain records to substantiate its charges on the contract. *Id.* at 1267-68. Further, it was undisputed that the contractor could not produce the required records. *Id.* at 1267. In this case, Smithsonian has not identified a similar specific records maintenance requirement or established that Turner has failed to meet such a requirement. Those issues remain in dispute and cannot be resolved on the motion for summary relief.

III. Turner's Motion Seeking a Ruling Upon Smithsonian's Criticisms is Premature

Turner, with its motion, seeks a ruling from the Board that four of the affirmative defenses asserted by Smithsonian are without a legal basis, entitling Turner to summary relief as a matter of law. Turner seeks summary relief on Smithsonian's contentions that its "claims are barred in whole or in part" because Turner has sought or retained payment for "costs to which Turner was not entitled to as a matter of fact or law" (No. 5); "Turner contemporaneously failed to record and segregate its costs between definitized and undefinitized" (No. 10); "Turner did not maintain supporting cost information for the amounts invoiced and provisionally paid, or supporting cost information for the additional amounts sought" (No. 11); and "Turner did not follow required source selection information procedures and failed to demonstrate the reasonableness of sole-sourced subcontracts." (No. 12). Turner acknowledged in its briefing and at argument that it must still shoulder the burden to prove its claims. It seeks summary relief on these four affirmative defenses because Turner believes that the defenses themselves are insufficient as a matter of law.

In response to Turner's motion, Smithsonian raises many of the same arguments regarding Turner's inability to meet the requirements of a total cost claim and failure to maintain documentation discussed above in consideration of Smithsonian's own motion. Its affirmative defense regarding Turner's failure to segregate definitized versus undefinitized costs is part of its argument that Turner cannot meet the requirements for the presentation of a total cost claim.

Although Smithsonian has asserted these defenses as affirmative defenses to Turner's claim, these defenses arise from its auditor's review of Turner's claim and other cost information in the audit that was conducted. These and other defenses asserted by Smithsonian are taken from a long list of "issues" identified by Smithsonian's auditors regarding the cost support for Turner's claims. The contracting officer appears to have accepted and adopted these criticisms in her 2014 decision denying Turner's claim and seeking repayment of \$24 million paid to Turner.

The problem with Turner's motion is that it seeks to have the Board decide the merits of Smithsonian's possible criticisms or defenses to Turner's claims before Turner itself has presented its claims to the Board for evaluation. It is unclear which of these many criticisms Smithsonian may raise in response or present as a basis for its claim for overpayment. Moreover, the parties' briefing does not sufficiently elucidate how these issues or defenses apply or bar Turner's claims. Although Turner asserts that it seeks a ruling "as a matter of law" regarding the applicability of these criticisms to its claims, the Board cannot decide those issues without having an understanding of the nature of Turner's claims and

Smithsonian's claim for repayment. The parties almost appear to be talking past each other on the issues raised in Turner's motion. The Board cannot rule on these points without understanding the nature of Turner's proof of its costs and Smithsonian's response.

Decision

For the reasons set forth above, we **DENY** the motions for summary relief filed by the parties. The hearing in this matter will commence on Monday, November 2, 2015, as scheduled. The parties shall provide to the Board any necessary redactions to this opinion on or before Friday, October 30, 2015.

MARIAN E. SULLIVAN
Board Judge

We concur:

H. CHUCK KULLBERG
Board Judge

RICHARD C. WALTERS
Board Judge