



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

GRANTED IN PART: April 6, 2016

CBCA 4068

SYSTEMS MANAGEMENT AND RESEARCH
TECHNOLOGIES CORPORATION,

Appellant,

v.

DEPARTMENT OF ENERGY,

Respondent.

Lorenzo F. Exposito, Washington, DC, counsel for Appellant.

James J. Jurich and Charmaine A. Howson, Office of the General Counsel,
Department of Energy, Washington, DC, counsel for Respondent.

Before Board Judges **DANIELS** (Chairman), **KULLBERG**, and **LESTER**.

LESTER, Board Judge.

Pending before us are the appellant's motion for partial summary relief and the Government's cross-motion for summary relief.

Appellant, Systems Management and Research Technologies Corporation (SMARTECH), argues in its motion that, under a proper interpretation of the contract at issue here, it was entitled to be paid a sum certain "fixed fee" for the contract's second base year period and for each of four option periods. Respondent, the Department of Energy (DOE), asks us to find that the "fixed fee" referenced in the contract was not a sum certain dollar amount, but an eight-percent markup to SMARTECH's hourly direct labor rate charges (subject to a fee ceiling).

In addition, each party seeks summary relief upon SMARTECH's requests for interest under the Prompt Payment Act (PPA), 31 U.S.C. §§ 3101-3907 (2012). According to SMARTECH, DOE failed timely to pay the fixed fee amounts that SMARTECH sought in its 2010 request for equitable adjustment (REA) and, in addition, to release a retainage after SMARTECH provided DOE with a final payment release.

DOE also requests that we grant summary relief in its favor upon SMARTECH's claim that DOE diverted work away from its contract in its final option year, which SMARTECH asserts should entitle it to recover rental charges that it incurred for office space that, because of the diversion, it did not need.

For the reasons explained below, we grant appellant's motion for summary relief on its "fixed fee" claim, but we grant the Government's motion for summary relief on SMARTECH's PPA and diversion claims.

Background

I. The Original Request for Proposals

On June 10, 2002, DOE issued a request for proposals (RFP), no. DE-RP01-02SO20138, seeking specialized technical support to the Office of Classified and Controlled Information Review (OCCIR) in reviewing classified and unclassified-but-sensitive documents. Appellant's Statement of Uncontested Facts (ASUF) ¶ 1; Appeal File, Exhibit 1 at 7, 13 (§§ B.1, C.1).¹ In a cover letter to the RFP, DOE indicated that it contemplated award of "[a] single, fixed rate, fixed fee, level of effort, task assignment, term type contract, with performance incentives." Exhibit 1 at 1; *see id.* at 88 (RFP § L.9: "The Government contemplates award of a fixed rate, fixed fee, labor hour contract resulting from this solicitation."). Nevertheless, DOE also indicated that it "reserve[d] the right to award any type of contract deemed appropriate." *Id.* at 1; ASUF ¶ 1. The acquisition was set-aside for small businesses. Exhibit 1 at 1, 89-90.

"Sections A through J of the RFP represent[ed] a draft contract [which was to] be the basis for the contractual relationship between DOE and the selected offeror . . ." ASUF ¶ 2 (quoting the RFP cover letter, Exhibit 1 at 1); *see* Exhibit 1 at 80 (RFP § L.2: "Any contract

¹ All exhibits referenced in this decision are found in the appeal file, unless otherwise noted. Further, to the extent that we cite to the ASUF or to Respondent's Statement of Uncontested Facts (RSUF) in this decision, the responding party admitted, or did not contest, those proposed facts.

awarded as a result of the solicitation will contain PART I – The Schedule, PART II – Contract Clauses, and PART III – List of Documents, Exhibits and Other Attachments.”). Section B.3 of the RFP contained a clause titled “Direct Labor Rates” in which offerors were to propose fixed hourly labor rates for various labor categories, as well as an “other direct cost not-to-exceed” amount, a “fixed fee,” and a “ceiling price” for the base period, as follows:

B.3 Direct Labor Rates (JUL 1991)

The Contractor shall provide [direct productive labor hours (DPLH)] from the labor categories set forth as follows at the fixed hourly labor rates indicated:

**** The following sample is to be used as a guide in completing ALL labor categories**

	Year One Regular Time	Hourly Rate
Program Manager		
Prime: Key: <u>(name)</u>		\$ _____
Task Area Coordinator		
Prime: Key: <u>(name)</u>		_____
Sub 1: Key: <u>(name)</u>		_____
Sub 2: Key: <u>(name)</u>		_____
Document Reviewer		
Prime:		\$ _____
Sub 1:		_____
Sub 2:		_____
Consultant:		_____
Other Direct Cost Not-To-Exceed		\$ _____
Fixed Fee		\$ _____

CEILING PRICE – BASE PERIOD \$ _____

*Overtime may only be authorized in writing by the Contracting Officer.

The rates indicated for each year of the contract shall apply to all DPLH provided during that respective year of the contract.

Exhibit 1 at 7-8. In response to section B.6 of the RFP, the offeror was to provide labor, “Other Direct Cost” (ODC) “Not-To-Exceed,” and “Fixed Fee” pricing in a similar manner for each of three option years. *See id.* at 9-11.

The RFP indicated that “[p]ayment shall be made for DPLH provided in accordance with” the contract clause titled “Payments under Time-and-Materials and Labor-Hour Contracts” at Federal Acquisition Regulation (FAR) 52.232-7 (48 CFR 52.232-7 (2001)). *See* Exhibit 1 at 42 (§ H.14(a)), 48. Pursuant to that FAR clause, the agency would pay the “hourly rate” for “all labor performed on the contract that meets the labor qualifications specified in the contract,” up to a ceiling price, 48 CFR 52.232-7(a)(3), (e), and that hourly rate would “include wages, indirect costs, general and administrative expense, and profit.” *Id.* 52.232-7(a)(4). The RFP also provided that subcontractors providing DPLH would be paid the “fixed rate per DPLH specified in Section B, clause entitled ‘Direct Labor Rate.’” Exhibit 1 at 42 (§ H.14(e)(2)).

Nevertheless, the RFP also indicated that the contract resulting from the solicitation would incorporate by reference the contract clause titled “Fixed Fee (Mar 1997)” from FAR 52.216-8, which read as follows:

(a) The Government shall pay the Contractor for performing this contract the fixed fee specified in the Schedule.

(b) Payment of the fixed fee shall be made as specified in the Schedule; provided that after payment of 85 percent of the fixed fee, the Contracting Officer may withhold further payment of fee until a reserve is set aside in an amount that the Contracting Officer considers necessary to protect the Government’s interest. This reserve shall not exceed 15 percent of the total fixed fee or \$100,000, whichever is less. The Contracting Officer shall release 75 percent of all fee withholds under this contract after receipt of the certified final indirect cost rate proposal covering the year of physical completion of this contract, provided the Contractor has satisfied all other contract terms and conditions, including the submission of the final patent and royalty reports, and is not delinquent in submitting final vouchers on prior years’ settlements. The

Contracting Officer may release up to 90 percent of the fee withholds under this contract based on the Contractor's past performance related to the submission and settlement of final indirect cost rate proposals.

48 CFR 52.216-8 (2001); *see* Exhibit 1 at 47; ASUF ¶ 5.

In responding to questions about the RFP provision allowing subcontractors to be paid the "fixed rate per DPLH," DOE indicated that offerors were *not* to apply "fee" to ODCs and noted that clause B.3 specifically segregates the fixed fee from the loaded hourly rates:

Question 10. 1. Item H.14 of page 39 of the subject RFP states that "Subcontractors providing DPLH will be paid the fixed rate per DPLH specified in Section B. . . ." Does this mean that prime contractor markup on the subcontractor costs such as [general and administrative expense (G&A)] and fee will not be allowed[?]. Are G&A and fee markups allowed on any ODCs including but not limited to Consultants, subcontractors, travel, etc?

Answer 10: *Fee cannot be applied to any OCD's.* It is up to offerors to determine whether or not to apply their G&A to consultants and subcontractor rates. *Note that Clause B.3 and the cost/price proposal preparation instructions specifically segregate the fixed fee from the loaded hourly rates.*

Exhibit 4 at 14 (emphasis added); *see* ASUF ¶ 6.

II. Appellant's Offer

On or about February 14, 2003, SMARTECH submitted a proposal in response to the RFP, and it revised the proposal on or about August 21, 2003. *See* Exhibits 6, 7.² In both the original and the revised proposals, SMARTECH represented that it was proposing a "fixed fee" of "approximately" eight percent of its total burdened labor costs, as follows:

² In its briefing, SMARTECH indicates that it first submitted a proposal in response to the RFP on July 25, 2002, with revisions submitted on January 31, February 14, and August 21, 2003. The appeal file that DOE submitted contains portions of SMARTECH's February 14 and August 21 cost proposals, but nothing from the July 25 or January 31, 2003, proposals. Because SMARTECH has not alleged that the July 25, 2002, and January 31, 2003, proposals were materially different from the August 21 proposal that immediately preceded DOE's letter contract award, which is discussed below, the specific date of the proposal submissions is not material to the pending summary relief motions.

SMARTTECH is proposing a fixed fee based on other rates which vary by labor category. These rates are shown in Table B-1. *The total fee, as computed, is approximately 8% of burdened labor costs.* The profit levels and application are discussed in the description of Exhibits [sic] A.

Exhibit 6 at 11 (emphasis added); see Exhibit 7 at 12. The referenced Table B-1 identified some of the economic assumptions underlying SMARTTECH's cost proposal, including a profit rate of eight percent:

Table B-1: Economic Assumptions

	Base Period			Option Periods	
	Year-1	Year-2	Year-3	Year-4	Year-5
SMARTTECH					
Fringe	31.47%	31.47%	31.57%	32.61%	32.61%
Overhead	6.23%	6.23%	6.26%	5.88%	5.88%
G&A	8.79%	8.79%	8.68%	8.69%	8.63%
Profit [Sub-Contractor]	0.00%	0.00%	0.00%	0.00%	0.00%
Profit	8.00%	8.00%	8.00%	8.00%	8.00%

Exhibit 6 at 15; Exhibit 7 at 16. SMARTTECH indicated in its proposal that it was listing profit "as a line item as specified in the RFP," with "a flat profit rate of 8%," and that the "table formats in Section B of the RFP include a fixed fee":

Note that the exhibits include profit as a line item as specified in the RFP. SMARTTECH's profit is computed only on direct labor, fringe benefits, overhead, and general and administrative expenses. No profit is computed on ODC's, sub-contractor costs[.] The profit in the exhibits is that included in the price by the Prime Contractor. The subcontractor is including profit in its prices to the Prime. The table formats in Section B of the RFP include a fixed fee.

The current contract uses different profit levels for different labor categories under the contract. The justification for this has been the different risks and costs involved in finding, hiring and retaining different grades of acceptable staff. SMARTTECH proposes a flat profit rate of 8%, as noted earlier, for both itself and [a subcontractor]. The profit rates are shown in Table B-1

Exhibit 7 at 14.

The cost proposal also provided a breakdown of the costs required by sections B.3 and B.6 of the RFP. SMARTECH represented that Table B-3, as “required by Section B-3 of the RFP,” “contain[ed] prices for the two contract years of the Base Contract Period,” and Table B-6, as “required by section B-6 of the RFP,” “contain[ed] the unit prices for the three option periods.” Exhibit 6 at 9; Exhibit 7 at 10. “The two tables contain[ed] hourly fixed labor hour prices for all staff members under the contract,” prices which were “fully burdened” (including “all indirect costs”). Exhibit 6 at 9; Exhibit 7 at 10. At the end of Tables B-3 and B-6, after listing the fixed hourly labor rates for a variety of specific labor categories for “Base Year 1,” “Base Year 2,” and the three option years, SMARTECH identified a specific dollar amount in the ODC “Not-To-Exceed” line, in the “Fixed Fee” line, and in the ceiling price line for both base years and all three option years:

Section B.3 Fixed Hourly Labor Rates
Base Contract Period

RFP Labor Category	Prime or SubCon	Key	Name	Base Year One Regular Time Hourly Rate (Price)	Base Year Two Regular Time Hourly Rate (Price)
Program Manager	Prime	Key	[Named Employee]	\$ 77.71	\$ 80.43
Technical Program Manager	Sub/Prime	Key	[Named Employee]	\$ 85.99	\$ 86.86
Training Coordinator	Prime	Key	[Named Employee]	\$ 78.88	\$ 81.64
....					
Other Direct Costs Not-To-Exceed				\$50,000.00	\$50,000.00
Fixed Fee*				\$ 326,446	\$ 382,480
Ceiling Price *Prime Only				\$8,813,241	\$ 9,113,531

Declaration of Bruce M. Jordan (Sept. 8, 2015), Attachment A.

On August 4, 2003, just before SMARTECH submitted its August 21, 2003, cost proposal revision, the DOE contracting officer sent an email message to SMARTECH, referencing a telephone conversation earlier that day. *See* Jordan Declaration Attachment B. In the email message, the contracting officer referenced the “total fixed fee amount” from sections B.3 and B.6 as follows:

Section B, Clause B.3 and B.6, include total fixed fee amount after Other Direct Costs. Also add a footnote indicating that the base for G&A excludes subcontractor and other direct costs.

Id.

III. Award of an Undefined Letter Contract

On September 30, 2003, DOE awarded SMARTECH an undefinitized time-and-materials (T&M) letter contract, no. DE-AC01-03S020138, for the technical support work. Complaint ¶¶ 1, 7, 17; RSUF ¶ 5; Exhibit 8. As anticipated by the RFP, the contract incorporated the “Fixed Fee” clause from FAR 52.216-8, which specified that “[t]he Government shall pay the Contractor for performing this contract the fixed fee specified in the Schedule.” Exhibit 8 at 46; ASUF ¶ 11. Nevertheless, the dollar amount lines in sections B.3 and B.6 of the contract for DPLH, ODC, “Fixed Fee,” and “Ceiling Price” were blank, and the terms of the letter contract remained undefinitized. Exhibit 8 at 4-8; Response to ASUF ¶ 10.

IV. The Definitized Contract

The contract was definitized by the parties on March 17, 2005 (after SMARTECH had already completed performance of the first base year of the contract), pursuant to modification no. A006. ASUF ¶ 12; Exhibit 21; Complaint ¶ 7. Consistent with the nature of a T&M contract, DOE was to issue specific work/task orders, or “task assignments,” to SMARTECH during the contract period identifying the specific tasks that SMARTECH was to accomplish and for which it would be paid at an hourly labor rate. Exhibit 8 at 13, 32 (contract clauses C.4.0 and H.8); *see* 48 CFR 16.601(b) (2014) (discussing T&M contracts). As definitized, the contract had a base period of twenty-four months, plus four option periods totaling an additional thirty-six months. As set forth in modification no. A006, the first and second option periods were for six months each, and the third and fourth option periods were each for twelve months. Complaint ¶ 8; ASUF ¶ 12; Exhibit 21 at 2-10.

Modification no. A0006 specifically amended section B.3 to add direct labor rates and “indirect cost ceilings,” as follows:

Part I, Section B, Clause B.3 Direct Labor Rates is hereby definitized and incorporated below as negotiations[.] Base Year 1 lists base labor rates per employee by name, in lieu of fully loaded labor rates by labor category. Accordingly, indirect cost ceilings are also separately provided immediately following the labor rates.

Exhibit 21 at 2. For Base Year 1 (September 30, 2003, through September 29, 2004), section B.3 was amended to list a base hourly rate for numerous labor categories, *id.* at 2-6, a list that was then followed by the language below:

Base Year 1 – Definitized	
Direct Labor (DL)	\$2,766,174
Fringe Benefits (FB)	\$ 951,011
Overhead (OH)	\$ 342,724
Other Direct Costs (ODC's)	\$ 12,360
General & Administrative (G&A)	\$ 541,998
Fixed Fee	\$ 368,153
Total Ceiling Price – Base Year 1	\$4,982,420

Id. at 6. For Base Year 2 (September 30, 2004, through September 29, 2005), the modification indicated that, “[b]eginning in Base Year 2, loaded fixed hourly rates are utilized and identified per individual key personnel and non-key labor categories,” and “[t]he base hourly rate is loaded with FB, OH, and G&A,” but not profit. *Id.* It then listed loaded fixed hourly rates for a variety of labor categories, followed by the language below:

Direct Labor Costs (DL, FB, OH, & G&A)	\$8,984,738
Other Direct Costs	\$ 50,000
Fixed Fee	\$ 718,779
Total Ceiling Price – Base Year 2	\$9,753,517

Id. Through subsequent modifications, similar listings of labor categories and dollar amounts were applied to the options, which resulted in a dollar amount of \$231,596 next to the words “Fixed Fee” applicable to the first six-month option period (Exhibit 31 at 3); \$231,596 for the second six-month option period (Exhibit 34 at 3); \$366,019 for the first one-year option period (Exhibit 39 at 3); and \$367,422 for the last one-year option period (Exhibit 57 at 3).

DOE exercised all four of the options. ASUF ¶ 14. SMARTECH was notified of DOE’s intent to exercise the fourth and final one-year option on August 28, 2007, Exhibit 80; Jordan Declaration ¶ 31, and DOE formally exercised the option through modification no. A019 on September 27, 2007. Exhibit 57. After exercising the option, the DOE contracting officer informed SMARTECH on or about March 6, 2008, that DOE had awarded a separate contract “that will satisfy the Department’s document review requirements” and that “SMARTECH should take all necessary steps to prepare for the complete phase-out of this contract on March 31, 2008.” Exhibit 65 at 2. Nevertheless, the contracting officer did not terminate SMARTECH’s contract, and the contract performance period ended on September 29, 2008. ASUF ¶ 14.

V. SMARTECH's Billing Practices During Performance

During contract performance, SMARTECH requested payment of fee in its invoices as an eight-percent markup to the DPLH charged. ASUF ¶ 15. It did not contemporaneously invoice for all of the fixed fee amounts that it now claims are due under its contract, *id.*, but followed a DOE-provided sample form only because, SMARTECH alleges (and DOE disputes), DOE instructed it to do so. Complaint ¶ 22; Answer ¶ 22; Exhibit 71 at 8-12. The sample invoice form called for the invoicing of fee amounts as an eight-percent markup to the DPLH charged under that invoice. Complaint ¶ 22; Exhibit 26 at 6-7; Exhibit 71 at 8-12.

SMARTECH first sought payment of the total unbilled “fixed fee” in an REA submitted to the contracting officer on September 29, 2010. ASUF ¶ 20; Exhibit 69 at 4. Accompanying that REA was a final release that reserved the claims now pending before the Board. Exhibit 69 at 13. In the REA, SMARTECH also sought recovery of several other costs, including rent on office space that it had leased in the fourth option year, and release of a \$50,000 retainage. *Id.* at 1-5. By letter dated May 18, 2011, the DOE contracting officer indicated that, if SMARTECH submitted a final payment invoice requesting the retainage, DOE would pay it, but denied the remainder of SMARTECH's REA. Exhibit 70 at 1-6. SMARTECH did not submit the requested invoice until June 19, 2013, more than two years after the contracting officer's request. Exhibit 71. DOE paid it within a few days.

VI. The Appeal

On March 28, 2014, SMARTECH submitted a certified claim for \$788,303.29, alleging entitlement to additional payment under the contract as follows: (1) unpaid fixed fees totaling \$722,236.79; (2) reimbursement for private office space in the amount of \$8436.61; (3) interest on unpaid fixed fees of \$54,602.94; and (4) interest on withheld retainage of \$3026.95. Exhibit 72. The contracting officer denied the claim on May 22, 2014. Exhibit 73. This appeal followed. After the Board denied DOE's motion to dismiss a portion of this appeal, *see Systems Management & Research Technologies Corp. v. Department of Energy, CBCA 4068, 15-1 BCA ¶ 35,796*, the parties filed cross-motions for summary relief, which are now pending before the Board.

Discussion

I. The Standard of Review

Each party seeks summary relief in its favor regarding the proper interpretation of the contract language. The standard that we must apply in reviewing motions for summary relief is well-established:

“Summary relief is only appropriate where there is no genuine issue as to any material fact and the moving party is entitled to relief as a matter of law.” *Butte Timberlands, LLC v. Department of Agriculture*, CBCA 3232, 13 BCA ¶ 35,383, at 173,627 (quoting *Greene v. Department of Homeland Security*, CBCA 49, 07-2 BCA ¶ 33,668, at 166,700). A material fact is one that will affect the outcome of a case. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986). “Any doubt on whether summary relief is appropriate is to be resolved against the moving party.” *Butte Timberlands*, 13 BCA at 173,627 (quoting *Greene*, 07-2 BCA at 166,700).

McAllen Hospitals LP v. Department of Veterans Affairs, CBCA 2774, et al., 14-1 BCA ¶ 35,758, at 174,972.

“When both parties move for summary relief, each party’s motion must be evaluated on its own merits and all reasonable inferences must be resolved against the party whose motion is under consideration.” *Government Marketing Group v. Department of Justice*, CBCA 964, 08-2 BCA ¶ 33,955, at 167,991. Nevertheless, “[c]ontract interpretation is a question of law generally amenable” to summary relief, *Varilease Technology Group, Inc. v. United States*, 289 F.3d 795, 798 (Fed. Cir. 2002), although “the question of interpretation of language, the conduct, and the intent of the parties, *i.e.*, the question of what is the meaning that should be given by a court or board to the words of a contract, may sometimes involve questions of material fact and not present a pure question of law.” *DJM/Reza, A Joint Venture*, VABCA 6917, et al., 05-1 BCA ¶ 32,943, at 163,208.

II. The “Fixed Fee” Claim

A. Contract Interpretation Rules

The main claim at issue in this appeal is SMARTECH’s request for payment of those portions of a fixed fee that, it asserts, were not paid during contract performance. The parties raise conflicting interpretations of the contract: SMARTECH alleges that the contract provided for a specific fixed fee that was to be added to any DPLH charges in the second contract base year and in each option period, while DOE alleges that the words “fixed fee” were used in such a way in this contract as to provide for an eight-percent “fee” markup on allowable DPLH charges (instead of the addition of a fixed dollar amount in each contract period).

“The primary objective of contract interpretation is to determine the intent of the parties at the time an agreement is created.” *600 Second Street Holdings LLC v. Securities*

& *Exchange Commission*, CBCA 3228, 13 BCA ¶ 35,396, at 173,666. In resolving a dispute about that intent, “we turn to the ‘time-honored rules’ of contract interpretation”:

The starting point for contract interpretation is the language of the written agreement. In interpreting the language of a contract, reasonable meaning must be given all parts of the agreement so as to not render any portion meaningless, or to interpret any provision so as to create a conflict with other provisions of the contract. The nature of the contract is determined by an objective reading of its language, not by one party’s characterization of the instrument.

Jane Mobley Associates, Inc. v. General Services Administration, CBCA 2878, slip op. at 10 (Mar. 9, 2016) (quoting *Champion Business Services v. General Services Administration*, CBCA 1735, et al., 10-2 BCA ¶ 34,539, at 170,345, *modified on reconsideration*, 10-2 BCA ¶ 34,598) (citations omitted).

B. The Contract’s Plain Language

SMARTECH alleges that, “[u]nlike a typical T&M contract, which would call for the capture of ‘fee’ as part of the burdened hourly rates, the Contract set out fixed and partially burdened hourly rates for direct labor and separate and stand-alone ‘fixed fee’ terms by contract/option period.” Complaint ¶ 9. Specifically, the contract, as definitized and subsequently modified, set out a “fixed fee” in the first base year (a period running from September 30, 2003, to September 29, 2004) of \$368,153;³ in the second base year (running from September 30, 2004, to September 29, 2005) of \$718,779; in option period one (running from September 30, 2005, to March 29, 2006) of \$231,596; in option period two (March 30, 2006, to September 30, 2006) of \$231,596; in option period three (October 1, 2006, to September 30, 2007) of \$366,019; and in option period four (October 1, 2007, to September 29, 2008) of \$367,422. *Id.* ¶¶ 12, 29. SMARTECH alleges that the fixed fee provisions “were not in any way qualified and were clearly independent from the otherwise burdened hourly labor rates and other elements of contractor compensation.” *Id.* ¶ 13. It asserts that its entitlement to a stand-alone fixed fee, in addition to payment for labor at the contractual hourly rates, is “consistent with DOE’s intent as expressed in its RFP.” *Id.* ¶ 10.

The plain language of the contract supports SMARTECH’s position. The original solicitation for this contract indicated that DOE anticipated making “a fixed rate, *fixed fee*,

³ SMARTECH does not seek any additional fee for the first base year because, it asserts, the contract was definitized after that year’s work was complete. Complaint ¶ 23.

labor hour contract, Exhibit 1 at 88 (emphasis added), and the subsequent letter contract similarly indicated that, when the contract was definitized, DOE contemplated that it would be a “fixed rate *fixed fee* labor hour definitive contract,” Exhibit 8 at 40 (emphasis added);⁴ the solicitation included a specific line for the dollar amount of the “fixed fee,” without mention of any kind of percentage markup, *id.* at 8; and the ultimate contract that was awarded contained not only that “fixed fee” line item but also the clause at FAR 52.216-8 titled “Fixed Fee.” Exhibit 8 at 4, 46. That FAR clause expressly directs that “[t]he Government shall pay the Contractor the fixed fee specified in the Schedule.” 48 CFR 52.216-8(a). The FAR provides that the Government will utilize the “Fixed Fee” clause at FAR 52.216-8 when contemplating a contract “that provides for payment to the contractor of a negotiated fee that is fixed at the inception of the contract” and “does not vary with actual cost.” *Id.* 16.306(a); *see id.* 16.307(b).⁵ In such contracts, “the fee represents the contractor[’]s profit.” *Fessel, Seigfriedt, & Moeller Advertising*, HUDBCA 90-5360-DO, 06-1 BCA ¶ 33,128, at 164,182 (1991); *see Sanders Associates, Inc.*, ASBCA 8481, 64 BCA ¶ 4091, at 19,985 (“The contractor’s basic obligation is to seek its profit in fixed fee, rather than as part of reimbursable costs.”); 48 CFR 15.404-4 (equating profit with fee); John Cibinic, Jr., Ralph C. Nash, Jr., & Christopher R. Yukins, *Formation of Government Contracts* 1207 (4th ed. 2011) (in a cost-plus-fixed-fee contract, “profit will be stated separately in the contract as a fixed fee”).

Although those factors support SMARTECH’s interpretation of this contract as calling for payment of a specific fixed dollar amount fee (or profit) in each contract period, the contract also contains the seemingly conflicting “Payments under Time-and-Materials and Labor-Hour Contracts” contract clause (T&M Payments clause) from FAR 52.232-7. Exhibit 8 at 47. Under that clause, which the Government is to include “in solicitations and contracts when a time-and-materials or labor-hour contract is contemplated,” 48 CFR 32.111(a)(7), the Government agrees to pay the contractor, upon submission of vouchers and subject to a

⁴ To the extent that the reference to a “fixed rate fixed fee labor hour” contract could be viewed as merging the fixed fee and a “fixed rate,” clause B.3 makes clear that the contractor was to identify “fixed hourly labor rates” for specific labor tasks, separate from the fixed fee. Exhibit 1 at 7-8; Exhibit 8 at 4-5. The “fixed rate” identified in this RFP and contract phrase clearly refers to labor rates, not the fee.

⁵ The “Fixed Fee” clause is typically used when a cost-plus-fixed-fee contract is contemplated. FAR 16.307(b). As we will discuss below, the contract here is not a cost-reimbursement contract. Nevertheless, given that this contract contains the FAR’s “Fixed Fee” clause as well as a line item titled “Fixed Fee,” the regulations that govern the use of the “Fixed Fee” clause are helpful in defining what the term “fixed fee” means.

ceiling price, agreed-upon hourly labor rates for work performed. *Id.* 52.232-7(a), (e). Under this clause, the hourly rates must “include wages, indirect costs, [G&A] expense, *and profit.*” *Id.* 52.232-7(a)(4) (emphasis added). Nevertheless, in the RFP, there was an express direction that offerors “segregate the fixed fee from the loaded hourly rates,” Exhibit 4 at 14 – that is, offerors were expressly directed to remove profit from the hourly rates – providing offerors with a more specific direction than the general one in the T&M Payments clause. See *Southcentral Foundation v. Department of Health & Human Services*, CBCA 541-ISDA, slip op. at 6 (Aug. 3, 2007) (“Under accepted rules of contract interpretation, the specific takes precedence over the more general.”) (citing *Hol-Gar Manufacturing Co. v. United States*, 351 F.2d 972, 980 (Ct. Cl. 1965)). Although, on its face, there is a facial disconnect between the “Fixed Fee” clause requiring a separate line item for a fixed amount of profit in each contract period and the T&M Payments clause requiring profit be included in the contractor’s hourly rates, the RFP clarified that hourly labor rates were to be loaded with indirect costs and G&A, but with profit segregated into a separate fixed fee.⁶

C. DOE’s Extrinsic Evidence

In light of the conflict in the “Fixed Fee” and T&M Payments clauses, DOE asks us to consider extrinsic evidence to define the meaning of the contract’s fixed fee provisions. “If a contract provision appears ambiguous on its face, extrinsic evidence may assist in discerning the parties’ intent and may show that language appearing on its face to be ambiguous is not because, for example, the parties shared a mutual understanding as to its meaning.” *A-Son’s Construction, Inc. v. Department of Housing & Urban Development*, CBCA 3491, et al., 15-1 BCA ¶ 36,089, at 176,210 (citing *Metropolitan Area Transit, Inc. v. Nicholson*, 463 F.3d 1256, 1260 (Fed. Cir. 2006)). Yet, the extrinsic evidence that DOE wants us to consider does not address the conflict between the “Fixed Fee” and T&M Payments clauses. That is, it does not address whether profit was supposed to be included

⁶ The language in modification no. A0006 does not affect this interpretation. In that modification, DOE indicated that “indirect cost ceilings are also separately provided immediately following the labor rates.” Exhibit 21 at 2. The modification then lists, after the direct labor rates, dollar amounts for fringe benefits, overhead, other direct costs, G&A, and “fixed fee.” *Id.* Although DOE suggests that the inclusion of “fixed fee” as part of the list of indirect costs (that is, fringe benefits, overhead, and G&A) suggests that fee was reimbursable at a percentage markup subject to a cost ceiling, profit is not an “indirect cost.” It is, instead, an “element of the potential total remuneration that contractors may receive for contract performance over and above allowable costs.” FAR 15.404-4(a)(1). Accordingly, we cannot interpret the “indirect cost ceilings” language in the modification to apply to the “fixed fee,” or profit, line item or to convert fixed fee to a percentage markup on labor rates.

in the hourly rates (which the T&M Payments clause would normally require, but that other provisions of the contract make clear was excluded) or was, instead, segregated into the “Fixed Fee” line item. Instead, DOE uses it to try to establish that the “Fixed Fee” clause and the corresponding line items identifying the fixed fee for each contract period were intended to provide for a fee or profit rate that would be added to the DPLH charges that SMARTECH billed. As a result, according to DOE, instead of being entitled to a fixed fee payment of \$718,779 in the second contract base year, SMARTECH was entitled to an eight-percent markup on the DPLH that it charged, up to a fee ceiling of \$718,779.

As support for this interpretation, DOE first argues that, in negotiating the dollar amount of the fixed fee, the parties assumed a profit rate of approximately eight percent. It cites to SMARTECH’s cost and pricing proposals as evidence that the parties agreed to a profit rate of eight percent. Yet, in its negotiation memorandum addressing the pricing proposal, DOE recognized that SMARTECH was merely proposing a “total fee . . . *reflective of a rate of 8%*” and that the negotiations “resulted in a total negotiated fee amounting [to] \$3,424,464,” without any mention of the fee actually being a ceiling for a percentage markup. Exhibit 20 at 6 (emphasis added). More importantly, the language ultimately used in the definitized contract does not reference a “fee rate” or “percentage,” but expressly identifies a dollar amount for a specific “Fixed Fee.” Exhibit 21 at 6, 7; Exhibit 31 at 3; Exhibit 34 at 3; Exhibit 39 at 3; Exhibit 57 at 3. In such circumstances, the mere fact that the parties used an eight-percent profit rate as a marker for negotiating the amount of the fixed fee does not suggest, in light of the actual contract language, that the fixed fee was actually a markup to hourly labor charges rather than a fixed fee.

More compelling is DOE’s evidence that, during performance of the contract, SMARTECH never billed for the full amount of the fixed fee. Instead, in each invoice that it submitted throughout contract performance, SMARTECH billed its fixed fee as an eight-percent markup to its DPLH charges. *See, e.g.*, Exhibit 40 at 5; Exhibit 41 at 3; Exhibit 42 at 5. Until submitting its REA in September 2010, almost two years after contract completion, SMARTECH never requested payment of the fixed fee other than as a percentage markup to its direct costs. “It is well settled that the practical interpretation of a contract, as shown by the conduct of the parties” during contract performance, “is of great weight in interpreting the contract.” *Dynamics Corp. of America v. United States*, 389 F.2d 424, 430 (Ct. Cl. 1968). Although SMARTECH relies on evidence in the record to argue that it was merely following the invoice format that the Government directed it to use, it does not explain why it never objected to that format, and never attempted to bill for the full fixed fee, throughout five years of contract performance.

Nevertheless, we cannot rely upon this evidence to create a genuine issue of material fact for two reasons:

First, “[t]he parol evidence rule is a rule of substantive law that prohibits the use of external evidence to add to or otherwise modify the terms of a written agreement ‘in instances where the written agreement has been adopted by the parties as an expression of their final understanding.’” *Barron Bancshares, Inc. v. United States*, 366 F.3d 1360, 1375 (Fed. Cir. 2004) (quoting *David Nassif Associates v. United States*, 557 F.2d 249, 256 (Ct. Cl. 1977)). “The rule thus renders inadmissible evidence introduced to modify, supplement, or interpret the terms of an integrated agreement,” and “[e]vidence of the parties’ course of dealing constitutes this kind of parol evidence that is prohibited by the rule.” *Id.*; see *Alves v. United States*, 133 F.3d 1454, 1459 (Fed. Cir. 1998) (“Alves’ attempt to vary the clear meaning of the exchange-of-use agreement in accordance with the parties’ ‘course of dealing’ is improper under the parol evidence rule.”). As a result, “[i]f the terms of a contract are clear and unambiguous, they must be given their plain meaning – extrinsic evidence is inadmissible to interpret them.” *Barron Bancshares*, 366 F.3d at 1375; see *The Carrington Group, Inc. v. Department of Veterans Affairs*, CBCA 2091, 12-1 BCA ¶ 34,993, at 171,984 (“we may not resort to extrinsic evidence to interpret” clear and unambiguous contract provisions (quoting *Banknote Corp. of America v. United States*, 365 F.3d 1345, 1353 (Fed. Cir. 2004))).

As we have already discussed, the plain language of the agreement supports SMARTECH’s interpretation of the contract’s “Fixed Fee” as being just that: a fixed fee. The FAR very clearly defines what a “fixed fee” is – “a negotiated fee that is fixed at the inception of the contract” and “does not vary with actual cost,” FAR16.306(a) – and there is no language in the contract stating that any other definition of the term “Fixed Fee” is intended or that it is really a percentage-of-billings markup. In the line item in which the contractor’s fixed fee dollar amount is listed, there is no reference to a “Fixed Fee Ceiling” or payment of a fixed fee at a particular percentage rate. To the contrary, the line item expressly refers to the “Fixed Fee” and contains a specific dollar amount. The eight-percent figure upon which DOE relies is not mentioned anywhere in the contract. Although DOE has identified an ambiguity in the contract, that ambiguity is unrelated to whether the “Fixed Fee” provision creates a fixed fee or, instead, a percentage markup with a fee ceiling. We are aware of no exception to the parol evidence rule that would allow a party to introduce extrinsic evidence regarding an unambiguous contract provision simply because, elsewhere in the contract, there is an unrelated ambiguity. The actual language of the contract very clearly indicates a fixed fee, not the percentage-of-DPLH fee markup that DOE advocates.

Second, even if DOE were to argue that the contract here is not fully integrated, it could not use extrinsic evidence to explain or contradict the terms of the actual contract. To establish that a contract is not fully integrated, a party may use parol evidence to supplement the actual language of the contract with consistent terms, but not to change or contradict it:

Even if the contract were only partially integrated, [plaintiff] would be permitted to introduce parol evidence only to supplement the “agreement by consistent additional terms.” However, it wants parol evidence to interpret the “necessary and incident” language of the contract. Consequently, whether the contract was fully integrated is really of no moment to [plaintiff], for its argument hinges upon whether the contract was ambiguous. Only then could the court resort to extrinsic evidence to inform its interpretation of that provision, regardless of whether the contract was fully integrated.

McAbee Construction, Inc. v. United States, 97 F.3d 1431, 1434 (Fed. Cir. 1996) (citations omitted); see *West Bend Mutual Insurance Co. v. Procaccio Painting & Drywall Co.*, 794 F.3d 666, 673 (7th Cir. 2015) (if contract is only partially integrated, “parol evidence may not be used to explain the writing or to introduce terms that contradict the written agreement”); *Robb Evans & Associates, LLC v. Holibaugh*, 609 F.3d 359, 365 (4th Cir. 2010) (even if contract is only partially integrated, “we may not consider evidence that contradicts its plain and unambiguous terms”); *Goodfellow Brothers, Inc.*, AGBCA 80-189-3, 81-1 BCA ¶ 14,917, at 73,808 (“Since the evidence contradicts the lease provisions, it is generally excludable under the rule regardless of whether the lease is fully or partially integrated.”).

Here, DOE is arguing that the term “Fixed Fee” does not mean what the FAR says it means, but should instead be read to say “Fee Percentage Markup” or something to that effect. Given that FAR expressly informs us what the term “Fixed Fee” means, we cannot accept extrinsic evidence – even evidence showing a mutual course of dealing, see *Barron Bancshares*, 366 F.3d at 1375 – to redefine that term in a manner that is wholly inconsistent with and contrary to the FAR, particularly where, as here, the contract language itself provides us with no basis for adopting that redefinition. See *United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76, 95-96 (1820) (Marshall, C.J.) (“The case must be a strong one indeed, which would justify a court in departing from the plain meaning of words . . . in search of an intention which the words themselves did not suggest.”).⁷

⁷ In DOE’s reply to SMARTECH’s opposition to DOE’s cross-motion, DOE, for the first time, argued that SMARTECH’s fixed fee claim should be barred by laches. See Respondent’s Reply at 13. Laches is an affirmative defense that DOE was required to raise in its answer. *Systems Integration & Management, Inc. v. General Services Administration*, CBCA 1512, et al., 13 BCA ¶ 35,417, at 173,767; Fed. R. Civ. P. 8(c)(1). Further, tribunals are not required to consider arguments raised for the first time in a reply brief. *Bannum, Inc. v. United States*, 121 Fed. Cl. 543, 552 n.6 (2015) (citing *United States v. Ford Motor Co.*, 463 F.3d 1267, 1277 (Fed. Cir. 2006)). It is too late to raise this defense now. Even if we considered the late-raised argument, a respondent seeking to establish laches must show

D. The Legality of the Parties' Interpretations

DOE argues that SMARTECH's interpretation of the contract would render it illegal. "[I]t is a rule of interpretation that, where a contract is fairly open to two constructions, by one of which it would be lawful and the other unlawful, the former must be adopted." *Hobbs v. McLean*, 117 U.S. 567, 576 (1886), *quoted in part in Northrop Grumman Computing Systems, Inc. v. General Services Administration*, GSBCA 16367, 06-2 BCA ¶ 33,324, at 165,266; *see Truc v. United States*, 212 Ct. Cl. 51, 64 n. 11 (1976) ("contract provisions should be construed, if possible, to be lawful rather than unlawful"). By statute, except in circumstances not applicable here, "the fee in a cost-plus-a-fixed-fee contract shall not exceed 10 percent of the estimated cost of the contract, not including the fee, as determined by the agency head at the time of entering into the contract." 41 U.S.C. § 3905(b)(1). DOE asserts that, under SMARTECH's theory, SMARTECH would be entitled to recover a fixed fee in excess of ten percent of the price for work actually ordered, in violation of the statute.

DOE's argument fails for two reasons:

First, SMARTECH's interpretation does not create a cost-reimbursement or cost-plus-fixed-fee (CPFF) contract. DOE created a contract under which SMARTECH was to be paid at fixed hourly rates that encompass wages, overhead, and G&A, but from which profit was excluded and paid separately. But for the segregated profit issue, the contract is consistent with a T&M contract:

When a contractor enters into a time and materials contract he agrees to furnish the labor and equipment necessary to fulfill his obligations at a prescribed rate.

(1) unreasonable, unexcused delay by the claimant in bringing suit to remedy an alleged wrong, and (2) either economic prejudice or "defense prejudice" (such as loss of records) to the respondent. *JANA, Inc. v. United States*, 936 F.2d 1265, 1269-70 (Fed. Cir. 1991); *Systems Integration*, 13 BCA at 173,767. DOE asserts that, had SMARTECH notified it of its interpretation of the contract earlier, it might "have acted to renegotiate and modify the contract or chose not to exercise any further options." Respondent's Reply at 13. Laches is inapplicable because DOE is complaining about a lack of notice during performance, not a delay in bringing suit. Further, DOE offers no evidence – through declaration or otherwise – that it actually would have changed its conduct with notice. Conclusory assertions by counsel unsupported by factual evidence are insufficient to defeat a motion for summary relief. *Mingus Constructors, Inc. v. United States*, 812 F.2d 1387, 1390-91 (Fed. Cir. 1987); *Levi Strauss & Co. v. Genesco, Inc.*, 742 F.2d 1401, 1404 (Fed. Cir. 1984); *Barmag Barmer Maschinenfabrik AG v. Murata Machinery, Ltd.*, 731 F.2d 831, 836 (Fed. Cir. 1984).

The rate to be charged for direct labor can be precisely predetermined at an hourly rate or any acceptable measurement. However, the rate for nonproduction personnel such as owners, officers, clerical workers, salesmen, and others must of necessity be estimated. This rate is referred to as overhead or burden rate.

H.L. Yoh Co. v. United States, 288 F.2d 493, 494 (Ct. Cl. 1961); *see* 48 CFR 16.601(b)(1) (defining T&M contract). Unlike a cost-reimbursement contract, a contractor under a T&M contract invoices according to the fixed labor rate negotiated at the start of the contract, even if the contractor's actual labor costs increase during performance:

To be a cost-reimbursement contract, the payments to the contractor would have to be based on its incurred costs. Under a time-and-materials contract, except for material costs, the contractor is not reimbursed for its incurred costs. It is paid on the basis of fixed hourly rates. Absent a change, or other Government action, the rate does not change with fluctuations of the contractor's costs.

Ralph C. Nash & John Cibinic, *Time-and-Materials and Labor-Hour Contracts*, 17 Nash & Cibinic Report ¶ 9, at 24 (Feb. 2003); *see id.* at 25 (unlike a cost-reimbursement contract, the contractor holding a T&M contract "takes the risk that the actual costs will be higher than the amounts included for direct labor and indirect expense"). Because SMARTECH's contract did not base payment upon actual performance costs, but upon pre-negotiated DPHL rates, it is technically not a cost-reimbursement contract to which the statutory limitations on CPFF contracts at 41 U.S.C. § 3905(b)(1) would apply.

Second, even if the contract here were a CPFF contract, the fixed fee to which the parties agreed was approximately eight percent of the estimated amount of work that DOE originally anticipated ordering. That is within the ten-percent limit set forth at 41 U.S.C. § 3905(b)(1). That DOE did not order all of the work that it originally anticipated does not render the negotiated fee in violation of the statutory limit.

To the extent that DOE is also claiming that SMARTECH's contract is illegal because it is a mixture of different contract types (a portion of a T&M contract and a portion of a fixed fee contract), we disagree with DOE's position. Contracts with the Government need not fall uniformly into one specific category or another, but "may be of any type *or combination of types* that will promote the Government's interest," except to the extent that a particular contract type is barred by statute. 48 CFR 16.102(b) (emphasis added). "A contract is not unenforceable merely because it does not fit neatly into a recognized category." *Ace-Federal Reporters, Inc. v. Barram*, 226 F.3d 1329, 1332 (Fed. Cir. 2000).

We can see nothing inherently illegal about the type of contract that SMARTECH alleges, and that we find, was created here.⁸

Based upon the plain language of the contract, we grant summary relief to SMARTECH on its fixed fee claim.

III. Prompt Payment Act Interest

A. Interest for Non-Payment of the Fixed Fee in the REA

SMARTECH submitted its REA seeking payment of its fixed fees on September 29, 2010. SMARTECH asserts that it is entitled to interest under the PPA because DOE did not pay monies owed within thirty days of the REA's submission.

Pursuant to the PPA, "where a contract does not specify a payment date, the government is obliged to make payments '30 days after a proper invoice for the amount due is received.'" *Reddick & Sons of Gouverneur, Inc. v. United States*, 31 Fed. Cl. 558, 559 (1994) (quoting 31 U.S.C. § 3903(a)(1)(B)). "[I]f payment is not made by the required payment date after the Government's receipt of a proper invoice," the contractor is generally "entitled to interest" under the PPA. *MCI WORLDCOM Communications, Inc. v. Social Security Administration*, GSBGA 16169-SSA, 04-2 BCA ¶ 32,689, at 161,760, *appeal dismissed sub nom. Barnhart v. MCI WORLDCOM Communications, Inc.*, 120 F. App'x 321 (Fed. Cir. 2005); *see Thunderhoof Ranch v. Department of the Interior*, CBCA 1554, et al., 10-2 BCA ¶ 34,477, at 170,046 ("If the agency does not make payment by the required

⁸ For its part, SMARTECH argues that DOE's interpretation, if accepted, would convert the contract into a cost-plus-percentage-of-cost (CPPC) contract, which, by statute, is illegal. 41 U.S.C. § 3905(a). We cannot agree. One of the criteria that the Court of Appeals for the Federal Circuit has accepted for evaluating whether a contract is a CPPC contract is that "the predetermined percentage rate is applied to actual performance costs." *Urban Data Systems, Inc. v. United States*, 699 F.2d 1147, 1150 (Fed. Cir. 1983) (citing 55 Comp. Gen. 554, 562 (1975)). The percentage markup that DOE advocates is based upon SMARTECH's DPLH rates, not its actual costs. Accordingly, the statute barring CPPC contracts is irrelevant in considering DOE's interpretation. *See United States v. Morgan Management Systems, Inc.*, No. 84-3350 (D.D.C. May 13, 1985), *summarized at* 32 Contract Cases Federal ¶ 73,561, at 78,521-22 (T&M contract with a six-percent fee was not a CPPC contract because the fee was a percentage of the fixed hourly direct labor rate, rather than a percentage of actual costs).

payment date, it must pay the contractor not only the principal amount due, but also an interest penalty.”).

Nevertheless, the PPA interest provisions are intended typically to apply when payments are “inadvertently late.” *Inversa, S.A. v. United States*, 73 Fed. Cl. 245, 247 (2006), *aff’d*, No. 2007-5110, 2007 WL 4467656 (Fed. Cir. Dec. 20, 2007). “Interest is not mandated ‘on a payment that is not made because of a dispute between the head of an agency and a business concern over the amount of payment or compliance with the contract.’” *Delta Air Lines, Inc. v. General Services Administration*, CBCA 1306, 09-1 BCA ¶ 34,052, at 168,408 (quoting 31 U.S.C. § 3907(c)). For the Government to avoid paying PPA interest because of a disagreement between the parties, “there must be, at the time payment of an invoice is delayed, a ‘present basis for delaying payment which is related to an objective discernible dispute.’” *Ross & McDonald Contracting, GmbH, ASBCA 38154, et al.*, 94-1 BCA ¶ 26,316, at 130,894 (1993). “All that is required to raise a *bona fide* dispute concerning contract compliance is that the government’s questions be raised in good faith. That a contractor may ultimately prevail on the merits does not defeat an otherwise proper payment withholding if there is such a good faith dispute.” *Dick Pacific/GHEMM, JV, ASBCA 55829, 08-2 BCA ¶ 33,937, at 167,942.*

SMARTECH, citing to the Claims Court’s decision in *Sterling Millwrights, Inc. v. United States*, 26 Cl. Ct. 49 (1992), argues that DOE’s refusal to pay “should not be deemed a sufficiently reasonable ‘dispute’ for purposes of excusing DOE from [PPA] interest liability.” Appellant’s Motion for Summary Relief at 8. In *Sterling Millwrights*, the Claims Court asserted that, to defeat liability for PPA interest, any dispute that the Government raises over a contractor’s right to payment would have to have “some reasonable basis” and that “[m]erely alleging the existence of a dispute, or raising a frivolous dispute, [would be] insufficient to deny the contractor its right to interest for late payments.” 26 Cl. Ct. at 90 n.15. In that case, though, the court had found that the contracting officer’s refusals to make progress payments “were precipitate and arbitrary” because they were invoked solely to create leverage in negotiations over an unrelated contract extension, meaning that there had not been any actual dispute over entitlement to the progress payments. *Id.* at 90 & n.15.

There is no suggestion in the record of this appeal that DOE, in declining to pay SMARTECH’s REA, did not hold a good faith belief that its interpretation of the contract was correct, and SMARTECH has not even alleged, much less provided evidence, that DOE somehow created a fake dispute as a pretext to DOE’s real objective of delaying payment. In such circumstances, the concerns that the court raised in *Sterling Millwrights* do not exist. See *Oregon Woods, Inc. v. Department of the Interior*, CBCA 1072, 09-1 BCA ¶ 34,014, at 168,204 (2008) (“Government officials are presumed to act in good faith. To overcome that presumption, a contractor must prove, by clear and convincing evidence, that the officials

had specific intent to injure the company.”), *motion for reconsideration denied*, 09-1 BCA ¶ 34,063, *aff’d sub nom. Oregon Woods, Inc. v. Salazar*, 355 F. App’x 403 (Fed. Cir. 2009). Accordingly, we have no basis for requiring the Government to pay PPA interest for contesting the validity of SMARTECH’s REA submission.

B. PPA Interest Upon a \$50,000 Withholding

Clause H.14 of the definitized contract, in conjunction with FAR 52.232-7 (which was incorporated into the contract), permitted the contracting officer to withhold five percent of the amount otherwise due to SMARTECH for DPLH, up to a \$50,000 maximum. Exhibit 8 at 35; *see* 48 CFR 52.232-7(a)(7). Pursuant to FAR 52-232.7(a)(7), “[t]he amounts withheld [were to] be retained until the Contractor executes and delivers the release required by paragraph (g) of this clause.” 48 CFR 52.232-7(a)(7). Paragraph (g) provided that the contractor “shall execute and deliver, at the time of and as a condition precedent to final payment under this contract, a release discharging the Government” from further liability under the contract except to the extent that specific claims are reserved. *Id.* 52.232-7(g). In response to invoice no. 19, which SMARTECH submitted in August 2005, DOE withheld the \$50,000 authorized by clause H.14.

On September 29, 2010, SMARTECH submitted an REA to DOE to which it attached the final release contemplated by FAR 52.232-7(g). *See* Exhibit 69 at 13; Complaint ¶ 41. In the REA, SMARTECH indicated that “[t]he [\$50,000] withholding must now be released to SMARTECH in accordance with the terms of the clause since SMARTECH is executing the requested release,” and it “request[ed] payment of this amount.” Exhibit 69 at 2, 13. By letter dated May 18, 2011, the DOE contracting officer indicated that SMARTECH had “submitted the release forms without a final invoice” and that “DOE is prepared to authorize the immediate release of the \$50,000 withholding . . . upon submission of an invoice from SMARTECH.” Exhibit 70 at 1. SMARTECH did not submit the requested invoice until June 19, 2013, more than two years after the contracting officer requested it. *See* Exhibit 71 at 1-3. DOE paid the invoice within a few days after its receipt. Complaint ¶ 65.

SMARTECH alleges that it is entitled to PPA interest based upon DOE’s failure to release the \$50,000 withholding in response to SMARTECH’s September 29, 2010, REA submission. Although it does not dispute that DOE was initially entitled to retain the \$50,000, SMARTECH asserted in its claim that DOE was required to release the withholding “upon ‘execution and delivery of a release by the Contractor’ as provided in paragraph (f) of [FAR 52.232-7],” without further action by SMARTECH. Exhibit 72 at 5 (quoting FAR 52.232-7(a)(2)). Because DOE had no authority to insist upon a new invoice requesting payment of the withholding, SMARTECH argues, it is entitled to PPA interest on the delayed payment of the \$50,000 withholding.

We agree with DOE that PPA interest did not accrue on DOE's failure to pay in response to the REA because the REA did not constitute a "proper invoice," as defined by the PPA and the FAR. By statute, a "proper invoice" for purposes of accruing PPA interest is "an invoice containing or accompanied by substantiating documentation the Director of the Office of Management and Budget [OMB] may require by regulation and the head of the appropriate agency may require by regulation or contract." 31 U.S.C. § 3901(a)(3). OMB implemented that obligation by promulgating 5 CFR 1315.2(y) and 1315.9(b), which require that a proper "invoice" contain specific information, including any "substantiating documentation or information required by the contract." 5 CFR 1315.9(b)(1)(x). The clause at FAR 52.232-25, which is incorporated into SMARTTECH's contract, further refines OMB's definition as it applies to procurement contracts and requires that a "proper invoice" must include "the items listed in paragraphs (a)(3)(i) through (a)(3)(x) of this clause," such as the name and address of the contractor, the invoice date, the contract number, a taxpayer identification number, electronic funds transfer (EFT) information, and "[a]ny other information or documentation required by the contract." 48 CFR 52.232-25(a)(3). SMARTTECH's REA did not contain all of the information required by FAR 52.232-25(a)(3). Accordingly, it does not meet the definition of a "proper invoice" under the relevant FAR clause and, therefore, does not provide a basis for the accrual of PPA interest.

SMARTTECH argues that it had already billed DOE for the costs underlying the \$50,000 retainage through invoice no. 19 (which it had submitted to DOE back in August 2005). It does not dispute that, in light of the language of clause H.14 and FAR 52.232-7(g), DOE was originally entitled to retain \$50,000 from the requested payment. Nevertheless, it asserts, quoting from FAR 52.232-7(a)(7), that the contracting officer is allowed to retain the \$50,000 only "until the Contractor executes and delivers the [final] release required by paragraph (g)" of that clause. That FAR provision does not mean, though, that the agency must pay *interest* under the PPA before a "proper invoice" is submitted. The August 2005 invoice, when first submitted, did not constitute a "proper invoice" under the PPA for purposes of payment of the retainage because it was not accompanied by a final payment release. Contrary to what SMARTTECH appears to argue, invoice no. 19 did not somehow ripen into a "proper invoice" for the retainage simply because SMARTTECH, five years after the invoice's original submission, gave the contracting officer a final release: under the FAR, the documentation necessary to support payment of the retainage – that is, the final release – had to accompany the "proper invoice" when the invoice was submitted. 48 CFR 52.232-7(a)(3)(x). The submission of the release as part of the REA, five years later, did not somehow retroactively convert invoice no. 19 into a "proper invoice" for the retainage under the PPA. The FAR, in fact, contemplates that the contractor will submit a final payment invoice, *see id.* 52.232-7(a)(4)(iii), which is exactly what the contracting officer requested that SMARTTECH do here. It is not the agency's fault that SMARTTECH inexplicably waited two years to submit the final invoice after DOE asked for it, and SMARTTECH is not entitled

to compensation for its own delay. *See Zinger Construction Co.*, ASBCA 41690, 92-1 BCA ¶ 24,652, at 122,992 (1991) (PPA interest on delayed repayment of \$1000 retainage did not begin to accrue until contractor submitted invoice for retainage).

IV. SMARTTECH's Diversion Claim

DOE seeks summary relief upon SMARTTECH's claim that, in the fourth option year, DOE improperly diverted work away from this contract. In its certified claim, SMARTTECH alleged that "DOE cut off funding to the fourth and final option period under the contract on March 31, 2008, six months into the 12-month option period," which constituted a contract breach "given DOE's stated purpose to divert SMARTTECH's work to a new, successor contractor." Exhibit 72 at 3. SMARTTECH complained that, although DOE did not terminate SMARTTECH's contract for convenience, DOE failed to give SMARTTECH any work under the contract between March 31 and September 29, 2008, when the contract expired. *Id.*

SMARTTECH's diversion claim is wholly dependent upon whether its contract constitutes a "requirements" contract. A requirements contract "provides for filling all actual purchase requirements of designated Government activities for supplies or services during a specified contract period (from one contractor), with deliveries or performance to be scheduled by placing orders with the contractor." 48 CFR 16.503(a). Only if SMARTTECH held a requirements contract could it complain if DOE diverted work to another contractor after March 31, 2008. *See Rumsfeld v. Applied Cos.*, 325 F.3d 1328, 1339 (Fed. Cir. 2003) ("the government breaches a requirements contract when it has requirements for contract items or services, but diverts business from the contractor and does not use the contractor to satisfy those requirements"). Otherwise, SMARTTECH was not guaranteed, and had no right to demand, that work.

The contract at issue here is not labeled a requirements contract, and it does not contain any of the contract clauses that the FAR mandates for requirements contracts. *See* 48 CFR 16.506(b), (d) (directing inclusion of FAR clauses 52.216-19 and 52.219-21 in requirements contracts). Although "[d]etermination of the type of contract is a matter of law – not controlled by a label in the contract," *Maintenance Engineers v. United States*, 749 F.2d 724, 726 n.3 (Fed. Cir. 1984), the Federal Circuit in *Coyle's Pest Control, Inc. v. Cuomo*, 154 F.3d 1302 (Fed. Cir. 1998), held (on review of a summary judgment decision) that a contract which did not contain the typical FAR requirements contract clauses could not be interpreted as a requirements contract, even if some clauses *suggested* some exclusivity, unless the contract language actually required the agency to purchase all of its requirements from the contractor under that contract:

The contract does include terms that suggest exclusivity. For instance, the contract obligates Coyle “to furnish *all* labor, service, equipment, transportation, materials and supplies to provide subterranean termite control and related services on *assigned* properties by [HUD].” (emphasis added). While the contract states that Coyle will provide all labor and services for a given property, the clause does not require HUD to assign Coyle *all* properties in the region. Thus, this contract language falls short of the exclusivity language necessary for a requirements contract.

Id. at 1305-06. We have previously interpreted *Coyle’s Pest* to mean that, where “the contract does not contain the FAR Requirements clause, to qualify as a requirements contract it must contain ‘words of exclusivity’ that not merely suggest, but require that *all* of the work be assigned to the contractor.” *Environmental Quality Management, Inc. v. Environmental Protection Agency*, CBCA 3072, 13 BCA ¶ 35,300, at 171,283 (emphasis in original); see *The Ducke Group, LLC v. Department of Veterans Affairs*, CBCA 3239, 13 BCA ¶ 35,337, at 173,459 (rejecting argument that requirements contract exists where “[t]here is no requirements clause or language to indicate that the agreement is such”); *Marut Testing & Inspection Services, Inc. v. General Services Administration*, GSBCA 15412, 02-2 BCA ¶ 31,945, at 157,821 (“Although these [contract] provisions impose an obligation upon Marut to perform and to provide the services contained in the contract’s statement of work, they do not impose an obligation upon GSA to fulfill all of its requirements by utilizing only Marut’s contract.”), *appeal dismissed*, 66 F. App’x 886 (Fed. Cir. 2003).

Here, the contract required SMARTECH to “furnish all personnel, facilities, equipment, material, supplies, and services . . . and do all things necessary for, or incident to,” providing “specialized technical support . . . in reviewing classified and unclassified[-but-sensitive] documents.” Exhibit 8 at 4. The original solicitation indicated that DOE anticipated making “[a] single” contract award for this work, and, “because services under this contract [were] vital to the Government and must be continued without interruption,” the contract required SMARTECH to be available to “furnish phase-in, phase-out services” and work with a successor contractor “for up to 90 days after this contract expires.” Exhibit 8 at 60. Although this language suggests some exclusivity, there are no actual “words of exclusivity” in the contract itself that expressly indicate that DOE is *bound* to order *all* of its document review requirements from SMARTECH. Accordingly, we cannot find it to be a requirements contract.⁹

⁹ SMARTECH cites to a declaration from its president in which he avers that he understood that, until March 31, 2008, the OCCIR “ordered all of its requirements for [non-appellate] classification and sensitive unclassified document review services” under

SMARTECH asserts that other tribunals have previously interpreted contracts to constitute requirements contracts despite the absence of FAR clauses associated with such contracts. *See, e.g., Crown Laundry & Dry Cleaners, Inc. v. United States*, 29 Fed. Cl. 506, 517-18 (1993); *Rowe, Inc. v. General Services Administration*, GSBCA 15217, 03-1 BCA ¶ 32,162, at 159,020; *Centurion Electronics Service*, ASBCA 51956, 03-1 BCA ¶ 32,097, at 158,658 (2002). In those cases, though, the contracts were written as indefinite-quantities contracts without any mandatory minimum orders, meaning that they would have been unenforceable and void unless they were interpreted as requirements contracts. *See Willard, Sutherland & Co. v. United States*, 262 U.S. 489, 493 (1923) (discussing indefinite-quantity contracts with no minimum mandatory obligations). Here, the contract contains a minimum payment obligation: the fixed fee to which SMARTECH is entitled in each contract period. Further, the tribunals in those cases found language in the contracts providing for exclusivity. The Federal Circuit's decision in *Coyle's Pest* and our decision in *Environmental Quality* preclude us from adding language that does not exist to this contract, and we must find that the contract is not a requirements contract. Accordingly, DOE's diversion of work away from this contract in the fourth option year, if that actually occurred, does not entitle SMARTECH to damages.

As a companion to its diversion argument, SMARTECH asserts that DOE breached the contract by exercising the fourth option period in bad faith, knowing at the time of the option exercise that it did not intend to honor the full one-year period of the option. It cites to the Federal Circuit's decision in *Salsbury Industries v. United States*, 905 F.2d 1518 (Fed. Cir. 1990), arguing that, "when the government contracts with a party knowing full well that it will not honor the contract, it cannot avoid a breach claim." *Id.* at 1521. In support of its position, it asserts that, before DOE exercised the fourth year option, it was already working on awarding a follow-on contract, and it asserts that discovery is necessary to determine whether, when she exercised the option, the contracting officer actually intended to honor the option's one-year term. SMARTECH has not cited to any evidence of bad faith or inappropriate intent. It had the opportunity to take discovery before responding to DOE's motion, but elected not to do so. Its entire defense to DOE's motion is supposition and speculation. That is insufficient to defeat a motion for summary relief. *Mingus Constructors*, 812 F.2d at 1390-91; *Barmag Barmer*, 731 F.2d at 836.

SMARTECH's contract. Jordan Declaration ¶ 28. The Federal Circuit in *Coyle's Pest* indicated that a similar declaration could not "override or contradict the plain language of the contract, which does not require sufficient exclusivity for a requirements contract." *Coyle's Pest*, 154 F.3d at 1306. It further found that such evidence is insufficient to show that *both* parties shared the same contractual intent. *Id.* Accordingly, the declaration upon which SMARTECH relies does not create a genuine issue of material fact.

We grant DOE's motion for summary relief on SMARTECH's diversion claim.

Decision

For the foregoing reasons, we grant appellant's motion for summary relief, and deny respondent's cross-motion for summary relief, on the "fixed fee" claim. We grant respondent's cross-motion for summary relief, and deny appellant's motion, on appellant's PPA claims. We grant summary relief to respondent on appellant's diversion claim.

DOE does not contest the amount of the unpaid fees. *See* Answer ¶¶ 25, 46; Response to ASUF ¶¶ 13, 17, 18. Accordingly, we find that SMARTECH is entitled to payment of \$722,236.79 on its "fixed fee" claim, plus interest under the Contract Disputes Act (CDA), 41 U.S.C. § 7009, running from March 28, 2014, the date that SMARTECH submitted its claim to the contracting officer, until the date of payment.

Accordingly, the appeal is **GRANTED IN PART**. DOE shall pay SMARTECH \$722,236.79, plus CDA interest running from March 28, 2014.

HAROLD D. LESTER, JR.
Board Judge

We concur:

STEPHEN M. DANIELS
Board Judge

H. CHUCK KULLBERG
Board Judge