



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

MOTIONS FOR SUMMARY RELIEF DENIED: July 25, 2016

CBCA 3871, 3912

SAFE HAVEN ENTERPRISES, LLC,

Appellant,

v.

DEPARTMENT OF STATE,

Respondent.

Falen M. LaPonzina of LaPonzina Law, P.C., Washington, DC, counsel for Appellant.

Dennis J. Gallagher, Office of the Legal Adviser, Buildings and Acquisitions, Department of State, Washington, DC, counsel for Respondent.

Before Board Judges **SOMERS**, **SHERIDAN**, and **LESTER**.

LESTER, Board Judge.

Pending before the Board are the parties' cross-motions for summary relief. Appellant, Safe Haven Enterprises, LLC (SHE), seeks summary relief on its challenge to two unilateral modifications that respondent, the Department of State (DOS), issued deobligating funds from a task order, which DOS had issued to SHE under a pre-existing indefinite delivery/indefinite quantity (IDIQ) contract. DOS seeks summary relief not only on the deobligation claim, but also on SHE's demand for release of a retainage that DOS originally withheld from a progress payment under a different task order and that SHE asserts has never been paid. For the reasons explained below, we deny both parties' motions.

Statement of Facts

Facts Relating to Task Order 002

1. In or around February 2004, DOS awarded to SHE contract no. SALMEC-03-D-0035, an IDIQ contract (IDIQ contract 0035) through which SHE could be awarded task orders for the provision of construction services to DOS. Respondent's Statement of Uncontested Facts in Docket 3871 (RSUF-3871) ¶ 1; Appellant's Statement of Genuine Issues in Docket 3871 (ASGI-3871) ¶ 1; Complaint ¶ 4; Answer ¶¶ 1, 4.

2. On or about March 28, 2006, the DOS contracting officer executed task order 002 under the contract, awarding SHE chiller replacement and energy conservation upgrade construction work at the United States Embassy in Georgetown, Guyana. RSUF-3871 ¶ 2; ASGI-3871 ¶ 2. The task order indicated that it was for a total fixed price of \$1,023,837.85. Exhibit 3.

3. Kathleen McGrade, who DOS asserts provided it with support services as an independent contractor, was the DOS point of contact for this task order. Complaint ¶ 8; Answer ¶ 8. SHE asserts that Ms. McGrade was actually a DOS employee who served as the contracting officer's technical representative (COTR), Complaint ¶ 8, but, for purposes of the motions here, her specific employment status is irrelevant. There is no dispute that Ms. McGrade was serving the role of DOS's representative for communications with SHE on this project.

4. On or about June 2, 2006, SHE submitted an invoice (invoice no. SHE1302, dated June 1, 2006) seeking a progress payment of \$683,396.49 for equipment and transportation costs under task order 002. DOS paid this invoice on or about June 13, 2006, but retained \$68,339.65 from the payment for what it called a "Standard 10% Retention." Exhibit 4 at 1, 3; RSUF-3871 ¶¶ 3, 4; ASGI-3871 ¶¶ 3, 4; Complaint ¶ 6; Answer ¶ 6.

5. On June 28, 2006, an employee of SHE questioned the DOS contracting officer about the \$68,339.65 retainage and whether it was appropriate to retain money for equipment that was already on site. Exhibit 33 at Tab 19. The contracting officer responded that he would discuss that issue with the contracting officer's representative the next day, *id.*, but the record does not reflect whether that discussion occurred or, if it did, the results of the discussion.

6. In an email message to the DOS contracting officer dated June 29, 2006, Brian C. Collinsworth, identifying himself as SHE's Vice President for Washington Operations, detailed SHE's anticipated future invoices under the task order: (1) a planned July 3 invoice

covering two change orders, transportation costs, and a \$77,792.40 “progress payment”; (2) a planned July 14 invoice; and (3) a planned July 31 “closeout” invoice of \$30,000 “[a]ssuming all deliverables are received.” Exhibit 33 at Tab 19. By responsive message on July 5, 2006, the DOS contracting officer acknowledged the anticipated schedule and stated that “I assume that the retention amount of \$68,339.65 is included in the July 3 invoice.” *Id.* The record here does not contain any responsive email message.

7. On or about July 7, 2006, SHE submitted another invoice (invoice no. SHE1308, dated July 3, 2006) seeking a further payment of \$200,000 under task order 002. Exhibit 6. That payment request encompassed payment for two change orders, transportation costs, and a \$77,792.40 “progress payment.” *Id.* DOS internally noted on documentation associated with that payment request that the \$77,792.40 progress payment “[i]ncludes \$68339.65 retention from Inv[oice] SHE1302 dated 6/12/06.” Exhibit 5 at 1. In these proceedings, SHE disputes that the payment request covered the \$68,339.65 retention.

8. On or about September 5, 2006, SHE submitted what it labeled its “Closeout – Final Invoice” (invoice no. SHE1315) under task order 002, seeking payment of \$30,000. Exhibit 7. SHE redated and resubmitted that invoice on or about October 16, 2006. *Id.*

9. In a letter dated September 5, 2006 (but signed and notarized on September 22, 2006), titled “Contractor’s Release Certification,” Mr. Collinsworth, as SHE’s Vice President of Washington Operations, certified as follows:

In connection with contract number *SALMEC-03-D-0035 TO #2* dated March 2006, covering *Chiller Replacement Project, Georgetown, Guyana*, the undersigned Contractor hereby certifies that there are no unpaid obligations of the undersigned, or of the Contracting firm or Corporation, to any employees of any nature, materials dealers, jobbers, sub-contractors or others which might form a claim against the Government or its property: and the undersigned Contractor hereby releases the U.S. Government, any employees, agents or agencies thereof from any and all claims, which have arisen or may arise, under or by virtue of this Contract.

There shall be no exception to the above certification, and such certification shall constitute a warranty by the Contractor for breach of which the Government shall be entitled to recover such damages as may result therefrom exclusive of, and in addition to, any remedies that might otherwise exist by virtue of the Contract, unless the certification is specifically conditioned in writing herein as to the existence of claims solely related to this project

pending between (a) the Contractor and the Government or (b) the Contractor and any of the above payees

Exhibit 8.

10. DOS approved final invoice no. SHE1315 for payment on or about October 20, 2006, Exhibit 7, and DOS subsequently paid it.

11. Both SHE and DOS agree that DOS has paid SHE a total of \$1,053,062.88 under task order 002. *See* Appellant's Response of June 10, 2016, to the Board's April 19, 2016, Order, at 2-3; Exhibit D to Appellant's Response of June 10, 2016; DOS's Response of May 20, 2016, at 3.¹ That payment exceeds the original \$1,023,837.85 fixed contract price for task order 002 by \$29,225.03. Nevertheless, in response to an inquiry about what the ultimate total task order price was (encompassing any contract modifications issued during performance), DOS informed the Board that the final total price was \$1,063,054.68, which is \$9991.80 more than what SHE has been paid. *See* DOS May 20 Response at 3. SHE appears to indicate that, after contract modifications, the final total contract price was only \$1,058,837.85, but that, at contract closeout, SHE elected not to claim the \$5774.97 in excess of \$1,053,062.88 actually paid. *See* Exhibit D, SHE Response of July 1, 2016. The contract modifications that affected the original contract price for task order 002 are not a part of the record here.

12. On or about October 10, 2007, SHE submitted another invoice (invoice no. SHE1415) under task order 002, seeking payment of the \$68,339.65 retainage. Exhibit 9 at 2. DOS declined payment, indicating as follows: "All obligations for the project have been paid and the project closed out. See attached Contractor's Release Certificate dated September 5, 2006." *Id.* at 1.

13. By letter to the DOS contracting officer dated July 25, 2012, which the parties agree is a claim pursuant to the Contract Disputes Act, 41 U.S.C. §§ 7101-7109 (2012), SHE asserted that DOS had not paid the ten-percent retainage, totaling \$68,339.65, under task order 003. *See* Exhibit 10. SHE demanded payment of the retainage.

¹ SHE did not provide us with a dollar figure indicating the total amount of payments that its records show it received from DOS under task order 002. Nevertheless, SHE identified each payment that it received from DOS under task order 002, which, when added together, total \$1,053,062.88.

14. On August 27, 2012, the contracting officer issued a final decision denying SHE's claim. He represented that a DOS contracting employee had informed him that, before DOS paid the \$77,792.40 progress payment discussed above, Mr. Collinsworth had agreed that the payment would encompass the \$68,339.65 retainage. *See id.* The contracting officer stated that, because the retainage had already been paid, and because Mr. Collinsworth had also signed a final release of claims under the task order, no further monies under task order 002 were due.

15. SHE subsequently appealed the contracting officer's decision to the Board.

Facts Relating to Task Order 003

16. On August 9, 2006, in response to a statement of work (SOW) that DOS had issued under IDIQ contract 0035, SHE submitted a cost proposal for environmental security construction work at the United States Embassy in Sana'a, Yemen. It proposed to perform the base requirements identified in the SOW (both Phase 2 design work and Phase 3 installation/transportation/commissioning work) for a total fixed price of \$2,736,956.47, plus options for the design and construction of a mail screening facility for \$71,997.42 and a core area for \$608,507.58. Respondent's Statement of Uncontested Facts in Docket No. 3912 (RSUF-3912) ¶ 3; ASGI-3912 ¶ 3; Exhibit 12.² SHE's cost proposal for those items, plus a \$17,500 bid stipend, totaled \$3,434,961.47.

17. SHE submitted another cost proposal on August 9, 2006, also in response to a SOW issued pursuant to IDIQ contract 0035, for environmental security construction work at the United States Embassy in Manama, Bahrain, proposing to perform the base requirements of that SOW (both Phase 2 design work and Phase 3 installation/transportation/commissioning work) for a total fixed price of \$3,170,768.72, plus an option for the design and construction of a core area for \$518,853.16. RSUF-3912 ¶ 2; ASGI-3912 ¶ 2; Exhibit 11. SHE's cost proposal for those items, plus a \$17,500 bid stipend, totaled \$3,707,121.88.

18. On September 5, 2006, Ms. McGrade sent an email message to Alta Baker, SHE's owner (with a copy to Mr. Collinsworth), providing a "follow-up notification concerning your competitive win of" task order 003 under IDIQ contract 0035 for both the Yemen and Bahrain projects, "in the amount of \$4,565,000.00." Exhibit 15; *see* RSUF-3912 ¶ 6; ASGI-3912 ¶ 6. The record does not indicate what notification had previously been made

² The cost proposal also included as an option a price for a consular waiting area, but, because DOS did not exercise that option, we do not discuss it here.

to SHE, to which this email message was the “follow-up.” In the email message, Ms. McGrade indicated that the “tasks to be performed” under the task order “include” Phase 2 (Design), Phase 3 (Construction), and core work in Yemen and Phase 2 (Design) and core work in Bahrain. It further indicated that “other tasks contained in each SOW respectively will be funded as money is available,” but that, “[f]or now, we will proceed with the tasks called out above.” Exhibit 15. We have been unable to match the \$4.565 million figure identified in the email message with any compilation of dollar figures contained in SHE’s Yemen and Bahrain cost proposals.

19. Ms. McGrade was DOS’s point of contact for SHE on task order 003. Complaint ¶ 8; Answer ¶ 8.

20. Twelve days *before* Ms. McGrade sent her September 5, 2006, email message to Ms. Baker, the DOS contracting officer, on August 24, 2006, executed task order 003 on Optional Form 347, a copy of which is found at 48 CFR 53.302-237 (2006). On its face, that document purported to be a single firm-fixed-price task order awarding SHE environmental security construction work at the United States Embassies in both Sana’a, Yemen, and Manama, Bahrain. Exhibit 13; Complaint ¶ 7; Answer ¶ 7. In describing the “unit price” and “amount” in blocks 17(e) and 17(f) of the task order form, DOS identified a dollar amount of \$3,704,500 for the Yemen work and \$3,907,500 for the Bahrain work. Exhibit 13. The dollar figures in the written task order are higher than the \$3,434,961.47 and \$3,707,121.88 figures (totaling \$7,142,083.35) identified in SHE’s cost proposals for the Yemen and Bahrain work, respectively. In addition, in block 17(l), titled “Grand Total,” DOS identified a dollar figure of \$7,612,000 – more than \$3 million above the price that Ms. McGrade identified in her September 5, 2006, email message (although it appears that the email message may have identified a somewhat lesser scope of work than the August 24, 2006, task order document). *Id.* In block 9, titled “Accounting and Appropriation,” DOS identified the “Obligated Amt” as \$7,612,000, matching the “Grand Total” in block 17(l).

21. In its response to SHE’s proposed uncontested facts, DOS has represented that the August 24, 2006, task order document “was apparently not issued to [SHE]” and that SHE only “received notice of award of Order 003 on September 5, 2006, in the amount of \$4,565,000.” Respondent’s Statement of Genuine Issues ¶ 10. We have been unable to locate any specific evidence in the record about when, either before or after performance of task order 003, SHE received a copy of or became aware of the actual signed Optional Form 347 task order.³ Nevertheless, the record contains a written statement by Ms. Baker (albeit

³ Despite SHE’s representations that it “entered into” and/or jointly executed task order 003 with DOS, apparently on August 24, 2006, *see, e.g.*, ASUF ¶ 10; Exhibit 33, Tab

not one contemporaneous with events) that she had “agreed with” the \$7.612 million amount and suggesting that she saw the task order at some point soon after task order 003 was issued on August 24, 2006. Exhibit 33, Tab 17.

22. On March 23, 2007, the DOS contracting officer issued unilateral modification no. M-007, deobligating \$269,538.53 in funding from the Yemen project under task order 003, and, on April 20, 2007, issued unilateral modification no. M-009, deobligating \$200,378.12 in funding from the Bahrain work under task order 003. Exhibits 21, 23; Complaint ¶ 13; Answer ¶ 13.⁴ After these funding obligation reductions, the amounts obligated under task order 003 matched the \$7,142,083.35 that SHE included in its original cost proposals for the base requirements and options that DOS ordered. The parties agree that SHE was not notified of these modifications or provided copies of them.

23. SHE asserts that, in early 2009, SHE received a phone call from the accounting department of DOS’s Bureau of Overseas Operations identifying an accounting error on task order 003. Complaint ¶ 13. SHE was told that, in 2007, Ms. McGrade, without telling SHE, had on two occasions convinced the DOS contracting officer to deobligate funds from task order 003 (through modification nos. M-007 and M-009), *id.*, and that the modifications were never provided to SHE. SHE suggests that the funds deobligated from task order 003 were redirected to a contract that Sterling, the company in which Ms. McGrade held an interest, had obtained. Complaint ¶ 17. SHE asserts that, after it learned of the deobligations, Ms. McGrade initially told SHE that the reasons for the deobligations “were none of SHE’s business,” Exhibit 34 at 3, and that, over the course of time, SHE was given various reasons for the deobligation of funds, including that the money had been needed for a DOS employee’s travel and that it was an internal accounting issue within DOS. Exhibit 32 at 2.

24. In a certified claim dated June 27, 2012, SHE asserted that there was no legal justification for the funding deobligations effected by modification nos. M-007 and M-009 and that SHE was entitled to payment of the deobligated amounts totaling \$469,916.65. Exhibit 34 at 3.

17, the task order itself is signed only by the DOS contracting officer, meaning that SHE never executed it, and we can find no specific evidence in the record as to date of receipt.

⁴ There are other unilateral modifications in the record through which the DOS contracting officer deobligated funds for task order 003, *see* Exhibits 22, 24, 26, but SHE has not identified these modifications as objectionable or a part of the claims at issue here.

25. By decision dated September 18, 2012, the DOS contracting officer denied SHE's claim, stating that the deobligation of funds was an internal appropriations matter within DOS and had nothing to do with SHE's ultimate contract price:

These funds were originally budgeted for the Department's administrative expenses in overseeing the project. They were in excess of the amounts SHE proposed to do the work, and their obligation to the task order was an administrative convenience intended to ensure that the funds were not reprogrammed to another project. The funds were subsequently deobligated to make them available for the Government administrative expenses for which they were budgeted and the result of the changes simply reduced the funding levels of the task order down to match the SHE proposals.

Exhibit 35 at 2.

26. SHE subsequently appealed the contracting officer's decision to the Board.

27. In response to an inquiry from the Board, DOS represented that, with subsequent contract modifications, the final total contract price for task order 003 was \$9,791,990.13, *see* DOS Response of May 20, 2016, at 4, but there is nothing in the record showing how that figure was calculated or how (through contract modifications) the task order price evolved over time, and there is no contract modification in the record identifying the total final task order price. DOS has also represented that, according to its records, SHE was paid the full final task order price of \$9,791,990.13. *Id.* For its part, SHE has represented that its records reflect payments totaling only \$9,758,627.54 for task order 003, *see* Exhibit L to Appellant's Response of July 1, 2016,⁵ which is \$33,362.59 below what DOS has identified as the final total task order price,⁶ but we have been unable to obtain from SHE a precise amount that it believes represents the correct total fixed price for task order 003 (considering the original task order price as amended through any written task order modifications).

⁵ Again, SHE did not identify a single dollar figure to us reflecting the total amount of DOS's payments under task order 003, but we took SHE's list of each payment under task order 003 and added the amounts together to reach the \$9,758,627.54 figure.

⁶ SHE also has indicated that it has invoiced a total of \$10,884,774.98 under task order 003 (not including the amounts that it seeks for the funding deobligations under modification nos. M-007 and M-009), \$9,758,627.54 of which DOS has paid.

28. We can find nothing in the record that explains how, after Ms. McGrade sent her email message of September 5, 2006, SHE was informed of subsequent increases in the scope and/or price of task order 003.

SHE's Suggestions of Improprieties

Throughout its pleadings and submissions, SHE makes references to odd behavior and alleged improprieties by Ms. McGrade, who was serving as DOS's representative on the two task orders at issue here, that it implies ultimately affect its case. As one example, in early 2010, Ms. McGrade required SHE to return to her all copies in its possession of the IDIQ contract associated with the two task orders at issue here, stating that the IDIQ contract was "no longer of interest" to SHE. Affidavit of Alta Baker ¶ 7 (Feb. 10, 2016); Affirmation of Victoria Baker ¶ 4 (Feb. 10, 2016). DOS has represented that, despite significant efforts, it cannot locate any copies of the IDIQ contract in its own files. Because the IDIQ contract, rather than the individual task orders awarded under it, contain the contract clauses applicable to the task orders, there is, with limited exception, no written record of the contract clauses that apply to these task orders.

Although the reasons for Ms. McGrade's demand for return of the IDIQ contract copies are unclear, SHE has referred to a relationship between Ms. McGrade and SHE's then-Vice President for Washington Operations, Mr. Collinsworth, and the criminal conduct in which they subsequently engaged. Specifically, in May 2006, soon after DOS originally awarded task order 002 to SHE (and before task order 003 was issued), Mr. Collinsworth and Ms. McGrade were married. Neither Ms. McGrade nor Mr. Collinsworth disclosed their relationship to DOS, and SHE asserts that it was similarly unaware of the relationship. At some point in 2008, Mr. Collinsworth left SHE's employment; moved to another company, the Sterling Royale Group, LLC (Sterling), that he and Ms. McGrade operated; and hired SHE's subcontractors to perform work on at least some of the DOS contracts that Sterling obtained. In 2013, both Mr. Collinsworth and Ms. McGrade pled guilty to improperly funneling more than \$50 million dollars of DOS contract work to Sterling between 2008 and 2011, in violation of competitive contracting requirements. See Plea Agreement Statement of Facts, *United States v. McGrade*, No. 13-CR-00185 (E.D. Va. filed Aug. 2, 2013); Complaint ¶¶ 23-24; Answer ¶¶ 23-24. DOS has represented that an Office of Inspector General (OIG) investigation associated with those convictions did not focus upon Mr. Collinsworth's work with SHE or with Ms. McGrade's dealings with SHE during performance of task orders 002 and 003, but instead dealt with the period of time after Mr. Collinsworth joined Sterling.

SHE repeatedly references this conduct in its briefs, insinuating that the same type of untoward conduct that resulted in these criminal convictions must have infected the payment

issues about which it is complaining. Yet, except for the seemingly odd disappearance of copies of IDIQ contract 0035, SHE has not identified any specific untoward conduct that directly and clearly affects the specific claims that SHE has raised in these appeals. To the extent that there are allegations that have an effect upon our analysis, we will discuss them below.

Discussion

I. The Standard for Summary Relief

The standard that we apply in reviewing a motion for summary relief is well established:

Resolving a dispute on a motion for summary relief is appropriate when the moving party is entitled to judgment as a matter of law, based on undisputed material facts. The moving party bears the burden of demonstrating the absence of genuine issues of material fact. All justifiable inferences must be drawn in favor of the non-movant. *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986). Nevertheless, to defeat a motion for summary relief, the nonmoving party must come forward with specific facts showing the existence of a genuine issue for trial.

AFR & Associates, Inc. v. Department of Housing & Urban Development, CBCA 946, 09-2 BCA ¶ 34,226, at 169,168. “A fact is considered to be material if it will affect the Board's decision, and an issue is genuine if enough evidence exists such that the fact could reasonably be decided in favor of the non-movant after a hearing.” *General Heating & Air Conditioning, Inc. v. General Services Administration*, CBCA 1242, 09-2 BCA ¶ 34,256, at 169,264. “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.” *Systems Management & Research Technologies Corp. v. Department of Energy*, CBCA 4068, 16-1 BCA ¶ 36,333, at 177,128 (quoting *Government Marketing Group v. Department of Justice*, CBCA 964, 08-2 BCA ¶ 33,955, at 167,991).

II. SHE’s Request for an Adverse Inference

SHE requests that we impose an adverse inference against DOS based upon the apparent destruction of all copies of the IDIQ contract that underlies the two task orders at issue in these appeals. Appellant’s Motion for Summary Relief at 29-37 (Dec. 14, 2015). According to SHE, Ms. McGrade instructed SHE to return to her its copies of the IDIQ

contract, a request with which SHE complied. Further, DOS now cannot find any copies of the IDIQ contract in its own files. Because we cannot, as a result, know precisely what contract clauses were listed in the IDIQ contract as applicable to task orders (including task orders 002 and 003), SHE asks us to make a general adverse inference against DOS and to bar DOS from arguing that it was legally entitled to issue unilateral modifications under task order 003 to deobligate funds.

“When the contents of a document are relevant to an issue in a case, the trier of fact generally may receive the fact of the document’s nonproduction or destruction as evidence that the party which has prevented production did so out of the well-founded fear that the contents would harm him.” *Dalmo Victor Division of General Instrument Corp.*, ASBCA 39718, 92-3 BCA ¶ 25,176, at 125,466 (quoting *Nation-Wide Check Corp. v. Forest Hills Distributors, Inc.*, 692 F.2d 214, 217 (1st Cir. 1982) (Breyer, J.)). This “adverse inference is based on two rationales”: an evidentiary one (“that a party who has notice that a document is relevant to litigation and who proceeds to destroy the document is more likely to have been threatened by the document than a party in the same position who does not destroy the document”) and a non-evidentiary one (“deter[ring] parties from destroying relevant evidence before it can be introduced at trial”). *Nation-Wide Check*, 692 F.2d at 218. Nevertheless, “without some . . . evidence” that “document destruction was in bad faith or flowed from the consciousness of a weak case,” a tribunal will “ordinarily” draw “no adverse inference” about the contents of the documents. *Allen Pen Co. v. Springfield Photo Mount Co.*, 653 F.2d 17, 23-24 (1st Cir. 1981) (Breyer, J.); see *Nation-Wide Check*, 692 F.2d at 219 (party’s “conscious abandonment of potentially useful evidence” may be sufficient to establish its belief in weakness of its case sufficient to justify adverse inference).

Here, we can infer from Ms. McGrade’s communications with SHE and the absence of any copies of the IDIQ contract in DOS’s files that, most likely, Ms. McGrade intentionally destroyed (or had someone destroy) all copies of it. In light of Ms. McGrade’s subsequent criminal conviction for funneling contract work to her and her husband’s company and of that company’s hiring of SHE’s subcontractors, it also seems clear that, although Ms. McGrade’s specific reasons for destroying IDIQ contract 0035 are unknown, any such effort was conducted not to benefit DOS, but to benefit herself. Coupled with the fact that SHE’s own employee, Mr. Collinworth, may have had some complicity in these events, we find it difficult to fault DOS, through an evidentiary sanction, for illicit activities by a rogue contract employee that were likely meant to undermine not only SHE, but also DOS.

The imposition of an adverse inference arising from document destruction is a sanction, *Hughes Aircraft Co.*, ASBCA 46321, 97-1 BCA ¶ 28,972, at 144,272, and “[a] tribunal is afforded considerable discretion in determining whether sanctions are appropriate,

and, if so,” the scope of those sanctions. *General Dynamics Ordnance & Tactical Systems, Inc.*, ASBCA 56870, et al., 12-1 BCA ¶ 34,944, at 171,806. Given the unusual circumstances surrounding the apparent destruction of the IDIQ contract and the fact that the destruction was not intended to benefit DOS, we do not believe that an adverse inference is appropriate. Even if it were permissible, we would exercise our discretion against imposition of such a sanction, at least based upon the present record. SHE is entitled to ask us to revisit this decision following further development of the record.

Another reason weighing against imposition of the sanction that SHE seeks at the present time is that it is unclear the extent to which the absence of the actual IDIQ contract will affect any issue in these appeals. DOS has submitted a copy of a similar IDIQ contract with SHE that, according to DOS, contains terms that likely would have been included in the missing IDIQ contract, and we do not yet know the extent to which, from that and SHE’s own records and witness memories, SHE may be able to reconstruct the necessary terms of IDIQ contract 0035 that it believes would affect our decision in this matter.⁷ Further, to the extent that there are questions about whether particular clauses were actually contained in SHE’s contract, the Federal Acquisition Regulation (FAR) mandates the inclusion of particular clauses in particular types of contracts, and, pursuant to the doctrine enunciated in *G.L. Christian & Associates v. United States*, 320 F.2d 345 (Ct. Cl. 1963), we can assume that clauses that the FAR required would have been included in SHE’s IDIQ contract or, alternatively, could be read into that contract. If the applicability of a particular clause becomes an issue that could affect the resolution of these appeals in the future, we can consider that matter if and when it arises. “Precisely how the [missing] document might have aided the party’s adversary, and what evidentiary shortfalls its destruction may be taken to redeem,” are always a necessary consideration for the Board in deciding whether to impose an adverse inference, and such decisions “will depend on the particular facts of each case.” *Nation-Wide Check*, 692 F.2d at 218. If SHE wants us to impose an adverse inference in the

⁷ To the extent that the requested adverse inference relates to the legality of unilateral modifications, it is well established in contract law that, if the agency issues a unilateral modification with which a contractor disagrees, the contractor has the right to dispute the modification through the contract’s Disputes clause. *See, e.g., Aquaterra Contracting, Inc.*, ASBCA 55160, 06-1 BCA ¶ 33,238, at 164,705-06; *Michael-Mark Ltd.*, IBCA 2697, et al., 94-1 BCA ¶ 26,453, at 131,632 (1993); *D.K. Nunnally Co.*, DOT BCA 2519, 92-2 BCA ¶ 24,982, at 124,515. Since that is precisely what SHE is doing here, and since DOS does not dispute SHE’s right to submit a claim under the Disputes clause that IDIQ contract 0035 must have contained, the absence of the IDIQ contract does not appear to have prejudiced SHE’s ability to pursue that particular challenge.

future, SHE will need to show not only that the IDIQ contract is missing, but also how it has affected SHE's ability to establish particular facts necessary to its legal entitlements.

III. SHE's Task Order 002 Claim (Unpaid Retainage)

A. The General Release That SHE's Vice President Signed

SHE argues that it is entitled to payment of a \$68,339.65 retainage that DOS withheld from SHE's progress payments under task order 002. SHE states that it successfully completed all task order 002 work, but that DOS has never released the retainage. In response, DOS first asserts that, in September 2006, SHE's Vice President for Washington Operations, Mr. Collinsworth, signed a complete release of claims under task order 002. That release, DOS argues, was a prerequisite to SHE's receipt of final payment under this task order. Accordingly, DOS argues that, based upon the release, SHE is precluded from any further recovery of monies under task order 002.

The type of release at issue here, which a construction contractor typically must submit to obtain its final contract payment, *see* FAR 52.232-5(h), is generally enforceable and would normally bar SHE's recovery of any costs not expressly exempted from the release. *See Mingus Constructors, Inc. v. United States*, 812 F.2d 1387, 1391 (Fed. Cir. 1987) ("the final payment acts as a bar under circumstances as exist in the present case because of the release executed by the contractor"); *B.D. Click Co. v. United States*, 225 Ct. Cl. 559, 560-61 (1980) (if "plaintiff accepted final payment and signed a general release without exception or reservation," it "would bar the claim"). Nevertheless, SHE raises two challenges to the release.

SHE first asserts that there is a genuine issue of fact "as to whether there was a unilateral or mutual mistake, oversight and/or fraud regarding the execution of the Contractor Release Certificate." Appellant's Response at 5 (Feb. 10, 2016). We reject SHE's argument. SHE is correct that, in appropriate circumstances, the legal theories that it mentions can provide a basis for vitiating or reforming an executed release. *See J.G. Watts Construction Co. v. United States*, 161 Ct. Cl. 801, 806-07 (1963) (discussing effect of mutual mistake, oversight, fraud, and duress in the execution of a release); *Walsh/Davis Joint Venture v. General Services Administration*, CBCA 1460, 11-2 BCA ¶ 34,799, at 171,262 (same). Here, though, SHE has not alleged, much less provided, any support for the application of these legal theories. SHE's sole support for its argument is that "there is no evidence that the Retainage Payment was actually made" when Mr. Collinsworth signed the release, a fact that SHE represents its accountant will support through testimony about her review of SHE's accounting records. Appellant's Response at 4 (Feb. 10, 2016). Yet, the mere fact that there may have been some money due when SHE's representative signed a full and complete

release does not automatically vitiate the release. To establish a mutual mistake in the release's execution, SHE would have to establish several factors, including that SHE did not bear the responsibility of reviewing its own accounting records before signing the release. *See P.J. Dick, Inc. v. General Services Administration*, CBCA 461, 07-1 BCA ¶ 33,534, at 166,119 (identifying factors necessary to prove mutual mistake). To obtain relief from a release under a unilateral mistake theory (a theory that applies to clerical or arithmetical errors or a misreading of specifications, rather than judgmental errors), the contractor would have to show, among other things, "unusual circumstances" for which the Government bears some responsibility that go beyond a mere misunderstanding of the "legal impact" of the release. *T.L. Roof & Associates Construction Co. v. United States*, 28 Fed. Cl. 572, 577 (1993). And SHE has alleged no facts that could be construed as constituting fraud by the Government in Mr. Collinsworth's execution of the release: although SHE has alleged that the activities of Mr. Collinsworth and Ms. McGrade during the performance of its contract are suspect, it has not identified any facts that would indicate that, back in 2006, DOS somehow fraudulently coerced Mr. Collinsworth into executing the release as part of the final payment process. Supposition and innuendo are insufficient bases for denying summary relief. *T&M Distributors, Inc. v. United States*, 185 F.3d 1279, 1285 (Fed. Cir. 1999).

The situations in which an executed general release will not be enforced are "special and limited," and a release is not to be lightly disregarded. *J.G. Watts*, 161 Ct. Cl. at 806. Mere identification of legal theories, without supporting factual allegations and evidence that would apply those legal theories to the case at hand, is insufficient to defend against a motion for summary relief. *Levi Strauss & Co. v. Genesco, Inc.*, 742 F.2d 1401, 1404 (Fed. Cir. 1984). In the circumstances here, we reject SHE's challenges to the release based upon mistake, oversight, and fraud.

SHE has raised a second challenge to the release, arguing that SHE is not bound by it because Mr. Collinsworth lacked authority to sign it. Like the Government, a corporation will be bound by the actions of an agent acting within the scope of his actual authority. "A principal may give his agent express authority only by express form of communication," although that grant of authority also provides the agent "implied authority to perform those acts necessary for him to exercise his expressed authority." *Strann v. United States*, 2 Cl. Ct. 782, 789 (1983) (citing *Restatement (Second) of Agency* § 7 (1958)). Unlike the Government, however, a corporation may also be bound by its agent's apparent authority. *American Anchor & Chain Corp. v. United States*, 331 F.2d 860, 861 (Ct. Cl. 1964); *Butte Timberlands, LLC v. Department of Agriculture*, CBCA 3232, 14-1 BCA ¶ 35,794, at 175,076. "Apparent authority differs from express authority because it does not result from the principal's actual grant of authority." *Strann*, 2 Cl. Ct. at 789. Instead, it arises "by written or spoken words or other conduct of the principal which, if reasonably interpreted, causes a third person to believe that the principal consents to have the act done on his behalf

by the person purporting to act for him.” *American Anchor*, 331 F.2d at 861. Under the apparent authority doctrine, “[a] principal whose actions have given a third party reasonable grounds for assuming that an agent has certain authority is estopped from pleading the agent’s lack of authority.” *Strann*, 2 Cl. Ct. at 789 (citing *Schimmelpennich v. Bayard*, 26 U.S. (1 Pet.) 264, 290 (1828)); see *Butte Timberlands*, 14-1 BCA at 175,076 (“whether the principal created a reasonable belief that the actor was authorized”). Typically, there are two situations that will result in a finding that an agent has apparent authority: (1) where an agent “repeatedly performs a function for his principal,” which evidences the “principal’s continued acquiescence,” and (2) where there “is a close relationship between the unauthorized act and the agent’s express authority, from which a third party could reasonably infer the agent’s authority to commit the unauthorized act.” *Strann*, 2 Cl. Ct. at 789.

The party seeking to establish that a corporate representative possessed either express or apparent authority bears the burden of proving it. *Great American Insurance Co. v. United States*, 481 F.2d 1298, 1309 & n.21 (Ct. Cl. 1973); *Butte Timberlands*, 14-1 BCA at 175,076.⁸ Further, “[a]pparent authority exists only to the extent that” the third person actually “believe[s] the agent to be authorized” and, in addition, only to the extent that “it is reasonable for the third person dealing with the agent to believe that the agent is authorized.” *Restatement (Second) of Agency* § 8 cmt. c (1958) (emphasis added). Accordingly, in this case, the Government bears the burden of proving that Mr. Collinsworth possessed actual or apparent authority to bind SHE to the release that he signed and, to the extent that the Government relies on the apparent authority doctrine, that the agency actually and reasonably believed that Mr. Collinsworth was authorized to do so.

⁸ In some jurisdictions, a general officer’s mere position implies the existence of actual authority to bind the corporation, and the corporate entity seeking to disavow that authority bears the burden of proving an absence of such authority. See, e.g., *Newbold v. Brennan Construction Co.*, 48 App. D.C. 90, 93 (D.C. Cir. 1918) (“The burden of proving lack of authority, where that is a defense to a contract made by a corporation acting by such a general officer as the president, is upon the [party], who asserts that lack of authority.”); *Equity Group, Inc. v. RCM Technologies, Inc.*, No. 84-Civ-2759, 1968 WL 12513, at *3 (S.D.N.Y. Oct. 31, 1986) (“Where the president of a corporation makes a contract in the course of the ordinary business of the corporation, the law presumes that he had the authority to do so and the burden of proving otherwise is on the party seeking to disavow the contract.”). Nevertheless, the presumption that an officer possessed authority, subject to rebuttal, appears to have been limited to the position of a corporation’s president. Even if we applied the presumption to a vice president like Mr. Collinsworth, there is a sufficient factual dispute on the record here to preclude summary relief, regardless of which party bears the burden of proof.

There is nothing in the record identifying the scope of Mr. Collinsworth's expressly authorized duties. In fact, the only evidence of record on that point is an affidavit from SHE's president stating that Mr. Collinsworth lacked authority to sign the release. *See* Affidavit of Alta Baker ¶ 4 (Feb. 10, 2016). In such circumstances, we cannot find, on a motion for summary relief, that DOS has established Mr. Collinsworth's express, or actual, authority to sign it.

Nonetheless, there is support in the record for DOS's apparent authority argument. Mr. Collinsworth's mere position as a vice president offers some suggestion of his apparent authority, even if the application of other factors, in appropriate circumstances, may make it not necessarily dispositive. *See Digital Ally, Inc. v. Z3 Technology, LLC*, 754 F.3d 802, 813 (10th Cir. 2014) (the title of vice president implies level of authority to conduct corporate business); *Federal Deposit Insurance Corp. v. Providence College*, 115 F.3d 136, 140 (2d Cir. 1997) (same); *C.E. Towers Co. v. Trinidad & Tobago (BWIA International) Airways Corp.*, 903 F. Supp. 515, 524 (S.D.N.Y. 1995) (same). "One familiar type of agency by apparent authority is appointment 'to a position, such as that of manager or treasurer, which carries with it generally recognized duties; to those who know of the appointment there is apparent authority to do the things ordinarily entrusted to one occupying such a position, regardless of unknown limitations which are imposed upon the particular agent.'" *American Anchor*, 331 F.2d at 862 (quoting *Restatement (Second) of Agency* § 27 cmt. a (1958)). "It makes no difference that the agent may be disregarding his principal's directions, secret or otherwise, so long as he continues in that larger field measured by the general scope of the business entrusted to his care." *Id.* (quoting *Kidd v. Thomas A. Edison, Inc.*, 239 F. 405, 407 (S.D.N.Y.), *aff'd*, 242 F. 923 (2d Cir. 1917)). Further, there is evidence in the record showing that Mr. Collinsworth, in addition to his title indicating his position as a corporate officer, routinely dealt with DOS in invoicing for task order 002 and that he was the company's representative in reaching agreement on the final invoice terms. *See* Exhibit 5 at 1. In addition, without the release that he signed, DOS would not have paid the final invoice, and SHE accepted without complaint the final payment that DOS made as a result of the release. *See* 48 CFR 52.232-5(h)(3) (2015) (under FAR clauses dealing with fixed-price construction contracts, the Government must obtain a release of all claims, except for those that are specifically reserved, before it can make final payment). These factors support DOS's argument that Mr. Collinsworth possessed at least apparent authority to bind SHE to the release.

Despite the strength of this evidence, we cannot find, on the motion for summary relief here, that DOS could rely upon Mr. Collinsworth's apparent authority. In addition to Ms. Baker's affidavit that Mr. Collinsworth lacked authority to sign the release, SHE has cited to an email message dated December 2, 2008, from Ms. McGrade, who was serving as the contract representative for DOS, to a project architect (and on which Mr. Collinsworth

and Ms. Baker were copied) in which Ms. McGrade commented upon the limits of Mr. Collinsworth's authority:

Brian is an employee of SHE and is not responsible for payment to the subcontractors nor responsible for anything financially pertaining to SHE's projects. When the [United States Government] has a question, we direct our inquiries to Alta's attention [as president of SHE]. Let's direct the communications to the proper and accountable party who is Alta Baker.

Exhibit C to Appellant's Reply Brief (filed Feb. 10, 2016). Similarly, Mr. Collinsworth informed the architect and Ms. McGrade that, as he had previously "made [them] aware," he "do[es] not have check writing authority with [SHE]." *Id.* As previously discussed, to prevail on an apparent authority theory, the Government must establish its actual belief that the agent possessed authority to bind the corporation. In considering the Government's motion for summary relief, we must view the factual evidence of record most favorably to SHE. *Systems Management*, 16-1 BCA at 177,128. Applying that standard, we cannot find at this time on the undisputed facts that the Government actually believed that Mr. Collinsworth possessed authority to sign the release.

We recognize that the situation here is rather odd. The undisclosed relationship between Mr. Collinsworth and Ms. McGrade, coupled with Ms. McGrade's efforts to keep secrets from DOS about her contracting activities, make it somewhat unclear the extent to which this email message chain should play into an apparent authority argument. Further, as DOS notes, the email message from Ms. McGrade about Mr. Collinsworth's authority came almost two years after Mr. Collinsworth had signed the release and DOS had made final payment on task order 002, making it unclear whether the alleged knowledge of limitations on Mr. Collinsworth's authority (if those limitations included signing the release at issue) should apply retroactively to the September 2006 time frame. When we consider the requirements of FAR 52.232-5(h), the timing of the Government's final payment, which was made only after it received the release, offers further indication of the paying official's belief in Mr. Collinsworth's authority. Nevertheless, to rule in DOS's favor, we would have to weigh the effect of Ms. McGrade's representations and knowledge, which we will not do in response to a motion for summary relief. Because we cannot state that there is no scenario under which SHE could prevail on its authority argument, we deny DOS's request for summary relief on the effectiveness of the release, although we reject all of SHE's other challenges to the release. Any further proceedings regarding the effectiveness of the release will focus solely on whether Mr. Collinsworth possessed actual or apparent authority to execute it.

B. Whether DOS Has Already Paid The Retainage

We next turn to DOS's argument that, even absent the release, DOS has already paid the \$68,339.65 retainage to SHE. DOS asserts that SHE included the retainage as part of a July 2006 request for payment of a \$77,792.40 "progress payment," even though the language of the relevant SHE invoice does not clearly identify the progress payment request as encompassing the retainage. As support, DOS cites to an apparently internal DOS handwritten notation on a printout of an email message, in which the author stated that the \$77,792.40 progress payment "includes \$68339.65 retention," Exhibit 5 at 1, and another non-contemporaneous statement reflecting a conversation to that effect between a DOS representative and Mr. Collinsworth.

Opposing DOS's motion, SHE's accountant states in an affidavit that she has reviewed SHE's accounting records and does not believe that the retainage was *not* included in the progress payment (although she does not provide any accounting support for the representation and does not explain what costs were covered by the \$77,792.40 progress payment). In light of the conflict in the record evidence, we cannot grant DOS summary relief on the issue of whether the \$68,339.65 retainage was ever paid.

Nevertheless, it appears that SHE, through this claim, may be seeking to recover *more* than the total fixed contract price for task order 002. This it cannot do. A retainage is simply a percentage of what the purchaser (here, the Government) owes the seller (or contractor providing services), which the purchaser withholds from payment during contract performance until a certain event, such as the acceptable completion of certain construction elements, has occurred. *See, e.g.,* Ralph C. Nash, Jr., Karen R. O'Brien-DeBakey & Steven L. Schooner, *The Government Contracts Reference Book* 349 (4th ed. 2013); *Black's Law Dictionary* 1509 (10th ed. 2014). The money retained is a part of, and falls within, the total fixed contract price – it does not represent an additional payment of monies above and beyond that agreed-upon total price. Here, as previously discussed, DOS has already paid SHE a total of \$1,053,062.88 under task order 002. That amount exceeds the original \$1,023,837.85 fixed price for task order 002 by \$29,225.03. If that number represents the final fixed price for this task order, SHE has no basis for seeking an additional payment through its release of retainage claim.

The record here, though, is less than clear as to whether there were price increases made to the task order through written contract modifications that are not part of the record. DOS represented in one filing that the final total price for task order 002 was \$1,063,054.68, which is \$9991.80 *more* than what SHE has been paid. *See* DOS May 20 Response at 3. In one of SHE's filings, though, SHE seemed to indicate that the total contract price may be *less*

than what DOS said it is. *See* Exhibit D, SHE Response of July 1, 2016.⁹ On the record before us, then, we cannot tell what the final total fixed price under task order 002 is or whether DOS has paid SHE less than that amount. To obtain payment of the full \$68,339.65 retainage that it seeks here, SHE will bear the burden of proving that the task order 002 fixed price is at least \$68,339.65 greater than what SHE has already been paid under task order 002. *See Lisbon Contractors, Inc. v. United States*, 828 F.2d 759, 768 (Fed. Cir. 1987) (contractor bears burden of establishing entitlement to and amount of costs that it is seeking). In no event can SHE recover more than the total task order 002 fixed price.

IV. SHE's Task Order 003 Claim (Deobligation of Funds)

Both parties seek summary relief on SHE's claim to recover monies that SHE asserts DOS "illegally" deobligated from task order 003. SHE asserts that the DOS contracting officer, illicitly and without SHE's knowledge, issued two unilateral contract modifications deobligating a total of \$469,916.65 from the funding for task order 003. SHE argues that DOS had no right to deobligate money from its task order, particularly in such an allegedly nefarious way, and that it is entitled to payment of the deobligated money. For its part, DOS asserts that it initially assigned too much funding to task order 003 and that the deobligation of funds was simply an administrative task to correct that overfunding (reducing funding to match the dollar amounts in SHE's original cost proposals):

For purposes of administrative convenience, Order 003 purported to obligate all the funds that had been made available for performance of the two projects, including funding in excess of Appellant's cost proposals that were included in the project funding for the Department's administrative expenses in overseeing the projects. These overobligations in excess of contractual obligations were improper, and were properly deobligated unilaterally.

Respondent's Motion at 6 (Jan. 20, 2016).

⁹ To date, SHE has not clearly identified what it thinks the final task order 002 price is, despite our requests that it do so. SHE has told us the dollar amounts identified in its task order 002 invoices and the amounts that DOS paid in response to those invoices, and SHE has calculated the gap between the invoiced and paid amounts as what it is now owed. But SHE has never indicated, much less established, that its invoiced amounts are all within the fixed task order price. The mere fact that the contractor issued an invoice does not mean, in and of itself, that the contractor is entitled to payment. It must prove a basis for the invoice.

In its filings, SHE's sole focus has been on what it calls DOS's illegal deobligation of funding. Yet, a contractor's rights are generally governed by its contract and the agreement that it reached on price with the Government in that contract. *Information Systems & Networks Corp. v. United States*, 64 Fed. Cl. 599, 604-05, *appeal dismissed*, 157 F. App'x 264 (Fed. Cir. 2005). Although there is certainly a relationship between the price of a firm-fixed-price contract and the agency's obligation of funds to support that contract, contract funding is a concept associated with and dependent upon an agency's appropriations from Congress, which is separate and distinct from contract pricing. See 1 General Accounting (now Accountability) Office (GAO), *Principles of Federal Appropriations Law* 1-2, 2-5 (3d ed. 2004) (GAO Redbook) (defining "appropriation" as "[a]uthority given to federal agencies to incur obligations and to make payments from Treasury for specified purposes"). Once there is an available appropriation through which an awarded contract could be funded, the amount of appropriated money that the agency affirmatively obligates to a firm-fixed-price contract (or takes away from it) becomes, in many ways, irrelevant to the contractor because the contractor will be entitled to payment of its contract price if it performs its contract obligations. *Salazar v. Ramah Navajo Chapter*, 132 S. Ct. 2181, 2189 (2012) (if agency has obligated funds through the award of a specific procurement contract, and the "Government contractor is one of several persons to be paid out of a larger appropriation sufficient in itself to pay the contractor, . . . the Government is responsible to the contractor for the full amount due under the contract, even if the agency exhausts the appropriation in service of other permissible ends"). Accordingly, assuming that "Congress appropriates adequate funds to cover a prospective contract, contractors need not keep track of agencies' shifting priorities and competing obligations; rather, they may trust that the Government will honor its contractual promises." *Id.* There is no allegation here that DOS did not have appropriations adequate to cover task order 003.

It appears, then, that the real issue here is not that DOS purported to deobligate funds from task order 003, but whether, in doing so, it also reduced SHE's fixed contract price under task order 003. Unfortunately, we cannot tell from the record before us whether, in deobligating money, DOS also reduced the fixed task order price to which it had previously agreed. In fact, we cannot tell what the original task order price to which the parties agreed actually was. The parties are going to have to develop the record further, and we will have to resolve this issue in future proceedings. Nevertheless, in an effort to focus the parties' future efforts in these appeals, we can address some of the issues that the parties have raised.

Normally, to identify the task order price, we would look to the written task order itself. The current record in this appeal establishes that, on or about August 24, 2006, the DOS contracting officer signed task order 003 on Optional Form 347, which identified a "unit price" for the Yemen work of \$3,704,500 (an amount in excess of what SHE identified in its cost proposal), a "unit price" for the Bahrain work of \$3,907,500 (also above what SHE

identified in its cost proposal), and a “Grand Total” price of \$7,612,000. Exhibit 13. DOS also identified \$7,612,000 as the amount that DOS was obligating to the task order from its appropriations. *Id.* Nowhere does it mention SHE’s cost proposals or any lower proposed prices. On its face, \$7,612,000 is what DOS purported to identify as the task order price – the contract price – for task order 003. We cannot read the task order to mean something other than what it says. *Powerine Oil Co.*, EBCA 278, et al., 91-2 BCA ¶ 24,007, at 120,146 (Board cannot imply terms into an agreement that conflict with its express terms).

DOS asserts that the contracting officer’s issuance of the document merely represents the Government’s acceptance of the offers that SHE made in its cost proposals. As a result, DOS suggests, we should rely on the dollar figures in SHE’s cost proposals as the task order price rather than the price identified on the task order document. Yet, the written task order makes clear that DOS did not “accept” SHE’s two cost proposal “offers,” but instead changed their terms. To create a contract, there must be “an unambiguous offer to contract, upon *specific* terms,” as well as “an unambiguous acceptance of that offer.” *Garza v. United States*, 34 Fed. Cl. 1, 14 (1995) (emphasis in original). “[A]cceptance must not deviate from the terms of the offer.” *Amplitrone, Inc.*, ASBCA 33732, 87-2 BCA ¶ 19,906, at 100,705; see *Delco Electronics Corp. v. United States*, 12 Cl. Ct. 367, 370 (1987) (party responding to an offer must provide “an unconditional acceptance of all of its terms”). If we view SHE’s cost proposals as offers, DOS did not “accept” them, but changed the proposed prices and provided SHE with a counteroffer that SHE presumably could accept through performance (since DOS did not ask SHE to sign the award document). *Luminator, Division of Gulston Industries, Inc.*, ASBCA 17674, 73-1 BCA ¶ 9822, at 45,904 (1972). To the extent that SHE, with knowledge of the task order 003 terms, performed the required work, the prices identified in task order 003 would appear to be what SHE accepted through its performance.

DOS also asserts that there is no evidence that DOS actually delivered the written August 24, 2006, task order to SHE and that, if it did not, SHE may not have relied on it when performing the task order 003 work. SHE at least suggests (although not without some ambiguity) that it was delivered. We cannot resolve that issue on the present record. If we view the Optional Form 347 document as a “contract” that would bind both parties, it would not be effective until it was delivered or somehow communicated to the contractor. *Emeco Industries, Inc. v. United States*, 485 F.2d 652, 656 (Ct. Cl. 1973). Similarly, if we view the Optional Form 347 form as DOS’s offer to SHE, it would not be effective until it was presented to SHE, which then could accept it through performance. See *Restatement (Second) of Contracts* § 24 (1981) (offer is a “manifestation of willingness to enter into a bargain” made to another person); *Black’s Law Dictionary* 1253 (defining “offer” as “[t]he act or an instance of presenting something for acceptance”). We cannot tell if, or when, the Optional Form 347 document was delivered or communicated to SHE. Ms. McGrade’s September 5, 2006, email message to Ms. Baker, representing that a task order had been

issued for approximately \$3 million less than what the written Optional Form 347 document reflects, further confuses our review of this matter, and there is virtually no explanation for the differing dollar figures in the record.

DOS suggests that we should consider the September 5, 2006, email message, which it views as the communication through which DOS most likely accepted the offers that SHE made in its cost proposals, as the parties' "contract," effective upon SHE's receipt. According to DOS, it may have been the first communication of task order terms to SHE. Contrary to DOS's argument, that email message could not have been DOS's "acceptance" of SHE's cost proposal offers, given that, at least on the record before us, it appears that DOS elected to purchase only *portions* of the base requirements covered by SHE's non-divisible cost proposals and unilaterally picked a price for those portions that we have been unable to match to the cost proposal pricing. *See Amplitronics, Inc.*, 87-2 BCA at 100,705 (acceptance cannot deviate from terms of offer). Nevertheless, it may be relevant to what SHE thought it was accepting, or what the contract price was, when it performed.

The record here is too sparse to allow us to understand exactly what was presented to SHE, when it was presented, or what SHE relied upon in deciding to perform the task order 003 work. Further, the record indicates that there were subsequent modifications to task order 003, as DOS has informed us that the ultimate task order 003 price was \$9,791,990.13, *see* DOS Response of May 20, 2016, and SHE represents that it has been paid almost that amount, but has invoiced almost \$10.9 million (not including the present task order 003 claim). *See* Exhibit L to Appellant's Response of July 1, 2016. These figures are all significantly above those identified in either Ms. McGrade's September 5, 2006, email message or the written August 24, 2006, Optional Form 347 task order. We do not know what the parties agreed to during performance of task order 003 or the effect of any such agreements on the original pricing of the task order. The record is simply devoid of any such information.

Nevertheless, if the written task order 003 document was issued to SHE, DOS would have to have some valid reason, such as the need to account for a deductive change in the scope of contract work or a mutual mistake, if it wanted unilaterally to issue a contract modification reducing the contract price. *Sterling Millwrights, Inc. v. United States*, 26 Cl. Ct. 49, 64-65 (1992). Because the Government "bears the burden that [a unilateral] price reduction was warranted," *Michael-Mark*, 94-1 BCA at 131,632, it would be DOS's burden to establish that a unilateral reduction to the task order price was justified. DOS has suggested that we could view the overstated \$7,612,000 dollar figure (if, as discussed above, that amount was ever communicated to SHE) as a mistake or error that DOS was unilaterally authorized to correct. *See* Respondent's Reply at 7 (Feb. 24, 2016). In support, it cites to the district court's decision in *Union Painting Co. v. United States*, 198 F. Supp. 282 (D. Alaska

1961), in which the court held that “knowledge by one party,” when accepting a contract offer or entering into a contract, “of the other’s mistake regarding an expression of the contract is equivalent to mutual mistake,” permitting reformation of the contract. *Id.* at 284; *see* 48 Comp. Gen. 672, 675 (Apr. 17, 1969) (“if a material mistake is made by one party to a contract and the mistake is known to the other party, or because of accompanying circumstances the other party had reason to know of the mistake, the latter party has no right to take advantage of the mistake and the party making the mistake has the right to rescission and restitution”).¹⁰ We need not examine at this time whether DOS’s apparently intentional inclusion of the \$7,612,000 figure in task order 003 would fall within that rule because the current record regarding the manner in which this task order contract was created is too unclear to permit us to evaluate contract formation issues. DOS will have to develop the argument in further proceedings.

We encourage the parties, in subsequent proceedings, to develop a more thorough record regarding what the original task order price was, whether the parties were aware of a “mistake” in the originally identified task order price, and if and how post-award task order modifications affected the original price. Ultimately, SHE is entitled to payment of the correct firm-fixed contract price (whatever that is) – nothing less, and nothing more. In further proceedings, SHE will bear the burden of establishing what its contract price is and the extent to which it has been paid less than that price,¹¹ *Lisbon Contractors*, 828 F.2d at

¹⁰ DOS did not raise mistake as an affirmative defense in its answer, as it is required to do. *See Resolution Trust Corp. v. Midwest Federal Savings Bank of Minot*, 36 F.3d 785, 791-92 (9th Cir. 1993); 48 CFR 6101.6(c) (2015). Nevertheless, “tribunals generally are liberal . . . in allowing the late assertion of [affirmative] defenses, absent prejudice to the opposing party.” *A-Son’s Construction, Inc. v. Department of Housing & Urban Development*, CBCA 3491, et al., 15-1 BCA ¶ 36089, at 176,207 (quoting *Ball, Ball & Brosamer, Inc.*, IBCA 97-1 BCA ¶ 28,897, at 144,084). We see no prejudice to SHE in allowing DOS to raise this defense at this time.

¹¹ During a recent telephonic status conference in these appeals, counsel for SHE suggested that there might be outstanding requests for equitable adjustment (REAs) that should entitle SHE to more money than, or an adjustment in, the current fixed task order 003 price. No claims arising out of such REAs are before us. The sole argument that has been presented in these appeals and in SHE’s complaint relating to task order 003 is SHE’s entitlement to the funds that DOS deobligated through modification nos. M-007 and M-009 and the corresponding reduction in the task order 003 fixed price. To the extent that SHE believes that it is entitled to monies in excess of its fixed contract price, it will have to submit claims to the agency (if time remains available under the applicable statute of limitations to do that) and, if necessary, file appeals seeking those additional monies.

768, while DOS will bear the burden of establishing any type of mistake in the original contract price that justified any unilateral reduction. *See Jazz Photo Corp. v. International Trade Commission*, 264 F.3d 1094, 1102 (Fed. Cir. 2001) (“burden of establishing an affirmative defense is on the party raising the defense”).

Decision

For the foregoing reasons, we deny both parties’ motions for summary relief. The Board will schedule further proceedings by separate order.

HAROLD D. LESTER, JR.
Board Judge

We concur:

JERI KAYLENE SOMERS
Board Judge

PATRICIA J. SHERIDAN
Board Judge