



UNITED STATES  
CIVILIAN BOARD OF CONTRACT APPEALS

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DISMISSED IN PART FOR LACK OF JURISDICTION:  
June 19, 2018

CBCA 4775, 5360

NVS TECHNOLOGIES, INC.,

Appellant,

v.

DEPARTMENT OF HOMELAND SECURITY,

Respondent.

James S. DelSordo of Argus Legal, LLC, Manassas, VA, counsel for Appellant.

Marshall Caggiano and Christopher M. Kovach, Office of the General Counsel, Department of Homeland Security, Washington, DC, counsel for Respondent.

Before Judges **SOMERS**, **GOODMAN**, and **ZISCHKAU**

**GOODMAN**, Board Judge.

These consolidated appeals were filed by appellant, NVS Technologies, Inc. (NVS) from two final decisions issued by a contracting officer of respondent, Department of Homeland Security (DHS). Respondent has filed two motions to dismiss portions of appellant's claim. Respondent first filed a motion to dismiss appellant's claim for lost profits that respondent alleges was first asserted in appellant's pre-hearing brief and supported by an expert's report included in appellant's pre-hearing submissions. During the briefing of that motion, respondent also moved to dismiss appellant's claims for lost opportunity cost and cost of bad credit which had been included in appellant's previous certified claim. We grant the first motion and dismiss the claim for lost profits for lack of jurisdiction. We defer ruling on the second motion until after the hearing on the merits in these appeals.

### Background<sup>1</sup>

In April 2010, appellant was awarded a cost-reimbursable, incrementally funded research and development contract (the contract). In February 2014, the contracting officer (CO) terminated the contract for convenience. Appellant submitted an initial termination settlement proposal (TSP) in March 2014 in the amount of \$3,790,149.20. In September 2014, respondent made a partial payment of future termination costs to appellant in the amount of \$1,139,729.60. After a Defense Contract Audit Agency (DCAA) audit, the CO concluded in response to the initial TSP that respondent had overpaid appellant's contract costs and termination costs, there was no further amount due appellant from respondent, and because of the overpayments, appellant owed respondent \$606,771.

In January 2015, during an attempt to negotiate a resolution of the initial TSP, appellant submitted to the CO what appellant characterized as a settlement proposal and what the CO characterized as a counter-offer in the amount of "\$12.7 M[illion]." The CO requested supporting documentation, and appellant forwarded a spreadsheet totaling \$12,816,468.22 with documentation allegedly supporting itemized costs which totaled \$3,656,197.82. Supporting documentation for two additional categories which totaled \$10,300,000 was not submitted. The only information submitted for these two categories was that included in a spreadsheet—a dollar amount of \$10,000,000 for "Lost Opportunity Cost" with four sentences of description,<sup>2</sup> and a dollar amount of \$300,000 for "Cost of Bad Credit" with two sentences of description.<sup>3</sup>

While the initial TSP was submitted with a Standard Form (SF) 1437 certifying the amount of \$3,790,149.20, appellant did not, as required by the Contract Disputes Act (CDA), 41 U.S.C. §§ 7101-7109 (2012), certify its counter-offer, which had increased to \$12,816,468.22, including the additional \$10,300,000 for "Lost Opportunity Cost" and "Cost of Bad Credit." In May 2015, the CO issued a final decision affirming his previous conclusion that appellant owed respondent \$606,771, and emphasizing that no supporting documentation had been submitted for the two categories totaling \$10,300,000. The final decision did not address certification of the claim or lack thereof.

Appellant appealed the final decision to this Board, and that appeal was docketed as CBCA 4775. In July 2015, appellant filed its complaint requesting judgment in the amount

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<sup>1</sup> This decision includes an appendix with citations to the record.

<sup>2</sup> Appendix ¶ 11.

<sup>3</sup> Appendix ¶ 12.

of \$12,816,468.22, the amount of its uncertified counter-offer. In March 2016, the Board raised sua sponte the issue of jurisdiction with regard to the apparent lack of certification of appellant's claim.<sup>4</sup> In April 2016 appellant resubmitted an amended TSP to the CO in the amount of \$12,812,466.22 and with a certification as required by the CDA. Appellant apparently believed that it had resubmitted with the amended TSP the information that it had previously submitted as its counter-offer, which had been the subject of the previous final decision. However, appellant failed to include the spreadsheet that contained the description of the two categories of "Lost Opportunity Cost" and "Cost of Bad Credit," the only information previously submitted with regard to these costs. The CO issued another final decision dated June 14, 2016, denying the amended TSP, again finding that appellant owed respondent \$606,771, and emphasizing that the amended TSP did not contain supporting documentation for the \$10,300,000 of costs, including the spreadsheet describing these costs previously submitted with the counter-offer. Appellant's appeal of that final decision was docketed as CBCA 5360 and consolidated with the previous appeal.

In July 2016, appellant filed its complaint in the consolidated appeals, again requesting relief in the amount of \$12,816,468.22, the same amount requested in the counter-offer, the complaint in the first appeal, and the amended TSP. The parties proceeded through discovery. After the parties concluded discovery, the Board issued a pre-hearing order which scheduled pre-hearing submissions to be submitted on August 22, 2017, and a hearing on the merits to commence on September 12, 2017.

Appellant included in its pre-hearing submission a document entitled "Expert Report of Chelsea Taylor Cullum, The Kenrich Group LLC" dated August 22, 2017 (the Kenrich Report). Two references in appellant's pre-hearing brief assert that appellant is entitled to recover lost profits in the amount of \$281,967,625, and cite the Kenrich Report.<sup>5</sup> There is no evidence that the Kenrich Report<sup>6</sup> or the information in the Kenrich Report with regard

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<sup>4</sup> The Board raised the issue of jurisdiction when it became apparent during the Board's deliberation of a motion for partial summary relief filed by respondent in August 2015 that appellant's counter-offer, the subject of the final decision, had not been certified. Appellant's subsequent re-submission of the counter-offer as an amended TSP rendered that motion for summary relief moot.

<sup>5</sup> Appendix 24.

<sup>6</sup> We make no determination at this time as to whether the author of the Kenrich Report is an expert, or the subject area of her alleged expertise. The extensive information in the Kenrich Report as to lost profits—a narrative opinion, spreadsheets, and supporting documents—is described in Appendix ¶ 29.

to lost profits had been previously presented to the CO as a certified claim or to respondent's counsel during discovery.

### Respondent's Motion for Dismissal of Appellant's Claim for Lost Profits

Respondent's motion<sup>7</sup> seeks to dismiss appellant's claim for lost profits, asserted in appellant's pre-hearing brief and supported by the the Kenrich Report, on two grounds: 1) the claim for lost profits must be dismissed for lack of jurisdiction because it constitutes a new claim, is not certified, and has not been presented to the contracting officer for decision. and 2) as a matter of law, lost profits are too remote and speculative to be compensable.

### Respondent's Motion to Dismiss for Lack of Jurisdiction Appellant's Claim for Lost Profits Because it is a New, Uncertified Claim

With regard to the jurisdictional ground to dismiss appellant's claim for lost profits, respondent's motion states:

Appellant presents a new, uncertified claim. It first raised lost profits in its pre-hearing brief less than two weeks before the scheduled hearing before the Board. Appellant's original TSP, its "counteroffer," and its amended TSP, upon which the CO issued a final decision, contained no references to lost profits stemming from future sales to other customers. And the claimed amounts differ significantly: Appellant's new claim references expectancy damages (\$281,967,625) that amount to 22 times the entire amount claimed in the TSP considered by the CO (\$12,816,466.22). It also represents more than 12 times above the original contract value (\$23,426,988.41).

Respondent's Motion to Dismiss at 11-12.

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<sup>7</sup> Respondent filed its motion for dismissal of appellant's claim for lost profits on August 28, 2017, and appellant filed its opposition to the motion on September 5, 2017. By Board order dated September 11, 2017, the day before the hearing on the merits was scheduled to commence, the Board deferred ruling on the motion until after conclusion of the hearing. Testimony was to be limited to the amount of the appellant's certified claim. The hearing on the merits was commenced on September 12, 2017, but has not been concluded. During that hearing, the Board held that it would resolve this motion before the hearing reconvened.

We therefore must determine if appellant's claim for lost profits is a new claim, because this Board does not have jurisdiction over new claims that have not been presented to the contracting officer. As we recently explained in *Walker Development & Trading Group Inc. v. Department of Veterans Affairs*, CBCA 5907, slip op. at 2-3 (June 6, 2018):

The Board may not consider new claims a contractor failed to present to the contracting officer. *Lee's Ford Dock, Inc. v. Secretary of the Army*, 865 F.3d 1361, 1369 (Fed. Cir. 2017) (citing *Santa Fe Engineers, Inc. v. United States*, 818 F.2d 856, 858 (Fed. Cir. 1987)). "A claim is new when it 'present[s] a materially different factual or legal theory' of relief." *Id.* (citing *K-Con Building Systems, Inc. v. United States*, 778 F.3d 1000, 1006 (Fed. Cir. 2015)). A claim before the Board is not required to rigidly adhere "to the exact language or structure of the original administrative CDA claim" presented to the contracting officer. *Scott Timber Co. v. United States*, 333 F.3d 1358, 1365 (Fed. Cir. 2003). It is enough that the claim to the contracting officer and the claim before the Board "arise from the same operative facts, claim essentially the same relief, and merely assert differing legal theories for that recovery." *Id.* "Materially different claims 'will necessitate a focus on a different or unrelated set of operative facts.'" *Lee's Ford*, 865 F.3d at 1369 (quoting *Placeway Construction. Corp. v. United States*, 920 F.2d 903, 907 (Fed. Cir. 1990)).

Appellant maintains its claim for lost profits asserted in its pre-hearing brief is not a new claim, but is related to its claim for "lost opportunity cost" in its counter-offer and amended TSP. Appellant focuses on the legal characterization of its claim in its filings in the appeal process:

Appellant's description of the dispute between it and the Government have [sic] not changed from its first Notice of Appeal here:

Appellant's original Complaint in CBCA No. 4775 stated that one of its claims was that the Government had terminated the MAMPT Contract in bad faith and that NVS was entitled to damages beyond those set forth in 48 CFR § 52.249-6 (the termination for convenience clause). See Complaint at ¶¶ 20-24, 33-39.

Appellant's Sur-Reply in Opposition to Respondent's Motion for Summary Relief, dated November 30, 2015, explicitly stated that Appellant was entitled

to expectation damages including lost profits.<sup>[8]</sup> See Appellant's Sur-Reply at 7.

Again Appellant's revised claim letter, dated April 15, 2016, once again clearly stated that NVS was entitled to recover expectation damages including lost profits. See R[ule] 4, Tab 50.

This discussion of the bases for Appellant's bad faith termination claim and its entitlement to expectation damages was repeated in Appellant's Complaint in CBCA No. 5360.<sup>[9]</sup> See Complaint II at ¶¶ 28-32, 41-48.

Therefore, Appellant has never changed its legal theory for the bad faith termination portion of its claim since the beginning of this litigation and this theory of relief was specifically presented to the contracting officer in Appellant's most recent claim letter. R[ule] 4, Tab 50.

Appellant's Opposition to Respondent's Motion to Dismiss (Appellant's Opposition) at pages 9-10.

[T]he alleged distinction between lost opportunity costs and lost profits is not accurate because they are both expectation damages whose purpose is to place the non-breaching party in the position that they would have been but for the Respondent's breach of contract . . . . Furthermore, under accounting principles there is no distinction between breach of contract damages for lost opportunities and lost profits.

*Id.* at 2.

Appellant states further that respondent's argument that appellant's claim for lost profits is a new claim "rests on an unfounded semantic distinction between the supposedly mutually exclusive terms 'lost opportunity costs' and 'lost profits.'" Appellant's Opposition at 8-9. Appellant argues that its use of the terms lost opportunity cost, expectation damages, and lost profits are mutually inclusive of each other, and concludes that respondent's attempt to disassociate the claim for lost profits from the claim for lost opportunity cost previously

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<sup>8</sup> The submission referenced mentions expectation damages but does not mention lost profits.

<sup>9</sup> The phrase "expectation damages" was not mentioned in the referenced paragraphs of the complaint.

submitted to the contracting officer is a semantic argument. Thus, appellant asserts that its claim for lost profits in the amount of \$281,967,625, asserted in its pre-hearing brief and the Kenrich Report, is not a new claim.

We do not view the issue as a semantic argument, as appellant suggests, and we find that appellant's argument lacks merit. Appellant's argument with regard to the claim for lost profits focuses on various phrases in its post-appeal filings and the extensive material in the Kenrich Report. However, appellant's discussion of its post-appeal filings makes no mention of or comparison to the information submitted to the CO in the initial TSP, counter-offer, or amended TSP. To resolve whether the claim for lost profits is a new claim, we must do what appellant has failed to do. We must compare the content of appellant's claim for lost opportunity cost, which was submitted to the CO in the initial TSP, counter-offer, and amended TSP, and the information in the pre-hearing brief and the Kenrich Report with regard to lost profits, which was not submitted to the CO.

Appellant's initial TSP was in the amount of \$3,790,149.20. Its counter-offer and amended TSP were in the total amount of \$12,816,468.22, which included \$10,000,000 in "lost opportunity cost," and this same total amount was alleged in the complaints as the total claim amount for both appeals. Appellant's explanation of the basis of the \$10,000,000 "lost opportunity cost" consisted solely of four sentences in the spreadsheet in appellant's counter-offer which was apparently inadvertently omitted in its revised TSP. More than two-and-a-half years passed between the counter-offer and the pre-hearing submissions, filed after the close of discovery and three weeks before the scheduled commencement of the hearing on the merits. Prior to the filing of the pre-hearing brief and the Kenrich Report alleging lost profits in the amount of \$281,967,625, appellant had made no claim for lost profits.

Appellant's attempt to equate its previous claims submitted to the CO with its claim for lost profits asserted in its pre-hearing submissions is not persuasive. A claim pursuant to the CDA must contain "a clear and unequivocal statement that gives the contracting officer adequate notice of the basis and amount of the claim." *Contract Cleaning Maintenance, Inc. v. United States*, 811 F.2d 586, 592 (Fed. Cir. 1987). A claim cannot be broadly stated; it should reflect a "careful and reasonably precise" submission to the contracting officer. *Tecom, Inc. v. United States*, 732 F.2d 935, 937 (Fed. Cir. 1984). With regard to the claim for lost opportunity cost submitted to the CO, appellant clearly did not meet this burden. The CO, in his decisions with regard to the counter-offer and the amended TSP, found no support for the lost opportunity cost. The initial TSP contained no allegation of lost opportunity cost. The counter-offer contained four sentences in the spreadsheet, the only information in the original uncertified claim describing "lost opportunity cost." This spreadsheet was apparently erroneously excluded from the amended TSP. These four sentences, without supporting documentation, allegedly support \$10,000,000 in unspecified "lost opportunity

cost,” but do not contain the phrases “lost profits” or “expectation damages.” There is no contemporaneous evidence as to the meaning of the four sentences in the spreadsheet, no explanation by any officer or representative of appellant by affidavit or otherwise, no supporting documentation, and no calculation indicating the derivation of the \$10,000,000 requested. The argument by counsel that lost opportunity costs and expectation damages includes lost profits is not helpful in determining what appellant might have been alluding to by stating a dollar amount and four sentences on a spreadsheet, which is the only information submitted before appellant’s pre-hearing brief and the Kenrich Report.

We recognize that in an appeal of a contracting officer’s decision before the Board, an appellant is not required to adhere rigidly “to the exact language or structure of the original administrative CDA claim” presented to the contracting officer. *Scott Timber Co. v. United States*, 333 F.3d 1358, 1365 (Fed. Cir. 2003). However, in light of the paucity of information submitted in the counter-offer—four sentences describing lost opportunity cost with no supporting documentation or calculation showing what these costs were (and even this information omitted in the amended TSP)—we cannot conclude that the claim for lost profits in the amount of \$281,967,625 as referenced for the first time in appellant’s prehearing brief and detailed in the Kenrich Report, with the extensive narrative, spreadsheets, and documents relied upon and included and referenced in that report, was encompassed within the claim for lost opportunity cost previously submitted to the CO. The analysis contained in the Kenrich Report, performed apparently toward the conclusion of the discovery period in the appeal and not shared with respondent until pre-hearing submissions were filed, contains the author’s opinion and accompanying spreadsheets which recite a myriad of operative facts, assumptions, and resulting calculations that clearly were not presented in the four sentences previously contained in the spreadsheet in appellant’s counter-offer. In addition, attachment 2 of the Kenrich Report lists eighty-nine documents relied upon to compile the report and exhibits, which have also not been submitted to the contracting officer.

We find that appellant’s claim for lost profits, as referenced for the first time in the appellant’s pre-hearing brief and detailed in the Kenrich Report, in an amount twenty-two times greater than the previously certified amount of appellant’s claim, with additional extensive supporting data, is clearly a new, materially different factual and legal claim for relief than was previously submitted to the contracting officer, and based upon different operative facts than were considered by the contracting officer in denying the counter-offer and amended TSP. As such, the contracting officer did not have “an ample pre-suit opportunity to rule on [the] request, knowing at least the relief sought and what substantive issues are raised by the request.” *K-Con Building Systems, Inc.*, 778 F.3d at 1006. Accordingly, as appellant’s claim for lost profits is a new, uncertified claim which has not



been submitted to the contracting officer for a final decision, the Board lacks jurisdiction over this claim.

Respondent's Motion to Dismiss Appellant's Claim for Lost Profits as a Matter of Law

As we lack jurisdiction over the claim for lost profits, we will not address respondent's second ground of its motion—that the claim for lost profits should be dismissed as too remote and speculative as a matter of law to be compensable.

Respondent's Motion for Dismissal of Appellant's Claim for Lost Opportunity Cost and Cost of Bad Credit

Respondent, in its reply to appellant's opposition to respondent's motion to dismiss, included for the first time a motion to dismiss, as unrecoverable as a matter of law, appellant's claims asserted in its counter-offer and amended TSP for lost opportunity cost (\$10,000,000) and cost of bad credit (\$300,000). Respondent argues that the claims for lost opportunity cost and cost of bad credit are in the nature of a claim for "destruction of business," and therefore consequential damages. Respondent argues further that since appellant had not provided supporting documentation for these costs previously, appellant has attempted, by asserting lost profits, to transform its claim for these costs into an anticipatory profits claim. Accordingly, respondent "requests the Board to dismiss Appellant's claim for \$10,300,000 in consequential damages as unrecoverable as a matter of law." Respondent's Reply to Appellant's Opposition to Respondent's Motion to Dismiss at 7.

Respondent further argues that since these costs were not addressed in appellant's pre-hearing brief:

[they] may have been rolled up into the larger figure of approximately \$281 million that Appellant now claims [for lost profit]. This seems likely, given that Appellant contends that Respondent pursues an "unfounded semantic distinction between the supposedly mutually exclusive terms 'lost opportunity costs' and lost 'profits.'" [Appellant's] Opposition at 9.

Respondent's Reply at 6.

It is not clear, as respondent suggests, that appellant has included the previously asserted amounts for lost opportunity costs and cost of bad debit in its lost profits claim. While there was scant information submitted as to lost opportunity cost and cost of bad

credit, in the counter-offer and certified amended TSP, both were addressed by the CO's final decisions. The Board's order on September 11, 2017, issued immediately before the hearing on the merits was scheduled to commence, stated that the hearing would address the amount of the certified claim. We cannot resolve respondent's motion on this issue on the current record, and will defer ruling on this motion until after the hearing on the merits. Respondent may renew the motion after the hearing on the merits is concluded.

### Decision

Respondent's motion for dismissal of appellant's claim for lost profits in the amount of \$281,967,625, asserted in appellant's pre-hearing brief and detailed in the Kenrich Report, is **granted**, and that claim is **DISMISSED FOR LACK OF JURISDICTION**. The Board **defers** ruling on respondent's motion for dismissal as to appellant's claim for lost opportunity cost and cost of bad credit.

*Allan H. Goodman*

ALLAN H. GOODMAN  
Board Judge

We concur:

*Jeri Kaylene Somers*

JERI KAYLENE SOMERS  
Board Judge

*Jonathan D. Zischkau*

JONATHAN D. ZISCHKAU  
Board Judge

### Appendix

1. On April 21, 2010, appellant was awarded HSHQDC-10-C-00053 (the contract), a cost-reimbursable, incrementally funded research and development contract. Appeal File, Exhibit 1.

2. On January 2, 2014, after the allotted funds were expended, respondent, in accordance with the Limitation of Funds clause in the contract, informed appellant that no additional funds would be added to the contract. Appeal File, Exhibit 20.

3. On February 6, 2014, the contracting officer (CO) terminated the contract for convenience. Appeal File, Exhibit 23.

4. On March 27, 2014, appellant submitted an initial termination settlement proposal (TSP) in the amount of \$3,790,149.20, accompanied by standard form (SF) 1437 itemizing the categories of costs claimed, and other documentation. The SF 1437 contained language similar to that required for certification pursuant to the Contract Disputes Act (CDA). Appeal File, Exhibit 24

5. Respondent referred the initial TSP to the Defense Contract Audit Agency (DCAA) for review and recommendations. Appeal File, Exhibit 29.

6. On September 29, 2014, respondent paid appellant a partial payment of future termination costs in the amount of \$1,139,729.60. Appeal File, Exhibits 17, 29.

7. On December 19, 2014, DCAA released an audit report (the DCAA audit report) which questioned \$3,915,605 of appellant's \$27,217,138 in total proposed costs under the contract. The total proposed costs were the sum of \$23,426,988 (previously submitted costs) and \$3,790,149 (costs sought in the initial TSP). Appeal File, Exhibit 27.

8. By email dated January 29, 2015, Appeal File, Exhibit 38 at 2, the CO submitted his analysis of the DCAA audit report to appellant. Appeal File, Exhibit 28. The CO summarized his analysis in a section entitled "Final Termination Settlement Conclusion," in which he concluded that respondent would allow \$23,037,223 for previously submitted costs and fees. As respondent had previously paid \$23,414,012 of these costs, this resulted in an overpayment of \$376,779 due from appellant. The CO further concluded that respondent would allow \$909,738 of the \$3,709,149 in termination settlement costs claimed. As respondent had previously paid appellant \$1,139,730 of termination settlement costs, this resulted in an overpayment of \$229,992 due from appellant. Accordingly, the CO concluded that appellant owed respondent the sum of the overpayments:  $\$376,779 + \$229,992 = \$606,771$ . *Id.* at 9.

9. Later that day, on January 29, 2015, via an attachment to email, appellant submitted to the CO what it characterized as a "settlement proposal." Appeal File, Exhibit 38 at 2.<sup>10</sup> By email dated January 30, 2017, the CO requested supporting documentation of the appellant's submission which the CO characterized as appellant's "counter-offer of \$12.7 M[illion]." On February 1, 2015, appellant submitted to the contracting officer via

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<sup>10</sup> The record is not clear as to what was attached to the email.

email what appellant characterized as its “counter-offer with supporting documentation,”<sup>11</sup> stating that “the total has increased slightly as some of our costs have grown with time since the first draft of this counter-proposal was prepared.” Documentation attached to appellant’s email consisted of a spreadsheet of itemized costs (spreadsheet) totaling \$12,816,468.22 (taking into account a credit for the previous payment of \$1,139,729.60). This amount was designated as the “Remaining Settlement Amount.” Appeal File, Exhibit 38 at 5.

10. The spreadsheet included the following categories of costs which totaled \$3,656,197.82: facility leases; cleanroom expansion; employee paid time off; vendor and consultant fees; executive compensation; interest on a loan from Bank of America; monthly expenses; accounting services; payroll for key employees, technology maintenance; general benefits furnished to key employees; and legal, consulting, and patent maintenance fees. A column entitled “Justification” contained a description of each itemized cost. *Id.*

11. In addition to the costs totaling \$3,656,197.82, the spreadsheet also included an itemized cost of \$10,000,000 entitled “Lost Opportunity Cost,” with the following four-sentences description in the column entitled “Justification”:

Because of DHS’s sudden, unanticipated and unwarranted contract termination, NVS has been unable to raise private funding due to severe damage done to its reputation. Because it is now obvious that the MAMTP contract has been terminated under false pretenses, it no longer makes sense to limit the fair settlement amount and further hold up the process based on procedural objections that are only relevant under the no longer applicable “termination for convenience” rules. Since October 2013, DHS’s delaying actions have been deliberate and punitive. The contract has been terminated in bad faith and it is now time for DHS to take full responsibility for its wrongdoing and resolve the contract in a fair manner that reflects the wrong being done to the company through this termination.

*Id.*

12. The spreadsheet also included an itemized cost of \$300,000 entitled “Cost of Bad Credit,” with the following two-sentence description in the column entitled “Justification”:

NVS’s bad credit, a direct result of the sudden and unannounced contract termination, has greatly increased NVS’s cost of doing business. Going

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<sup>11</sup> Appellant subsequently characterized this submission as a “revised termination settlement proposal.” Appeal File Exhibit 50 at 6. We will refer to it throughout this decision as the counter-offer.

forward, because of this bad credit NVS must now pay signing bonuses in order to re-hire critically important former employees and attract new ones, will be forced to pay higher interest rates for financing, and will need to pay for all materials and services upfront [sic].

*Id.*

13. Accompanying appellant's counter-offer and spreadsheet were documents that allegedly supported the categories of costs that totaled \$3,656,197.82. No documentation was submitted with regard to the lost opportunity cost (\$10,000,000) or cost of bad credit (\$300,000). Also, appellant had not submitted a certification as required by the CDA for the increase over the total dollar amount of the initial TSP by these amounts.

14. On May 22, 2015, the CO issued a decision, determining that "appellant is not entitled to any further amount due based on either its termination settlement proposal dated 3/18/14<sup>[12]</sup> or subsequent counter-offer dated 2/1/15" and that respondent was due \$606,771 from appellant as the result of overpayment to appellant. That decision stated further that "[t]his determination constitutes a final decision which NVS may appeal under the Disputes clause of the contract." The decision made no mention of the certification required by the CDA or lack thereof with regard to appellant's initial TSP or counter-offer. Appeal File, Exhibit 49.

15. On June 1, 2015, appellant appealed the CO's decision to this Board. The appeal was docketed as CBCA 4775. On July 2, 2015, appellant filed its complaint requesting judgment in the amount of \$12,816,468.22, the amount of its counter-offer.

16. During a conference with counsel on March 1, 2016, the Board raised sua sponte the issue of jurisdiction.<sup>13</sup> On March 2, 2016, the Board issued an order to show cause as to why the case should not be dismissed, in whole or in part, for lack of jurisdiction, inquiring "if appellant had properly certified its claim pursuant to the Contract Disputes Act (CDA) with regard to the initial termination for convenience settlement offer [initial TSP] and the revised termination for convenience settlement 'counter-offer [counter-offer].'"

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<sup>12</sup> While the TSP was submitted on March 27, 2014, the SF 1437 accompanying the TSP was dated March 18, 2014. Appeal File, Exhibit 24 at 1, 3.

<sup>13</sup> While appellant had submitted an executed SF 1437 with regard to its initial TSP in the amount of \$3,790,149.20, the record did not contain a certification of the additional amounts alleged in the counter-offer, which totaled \$12,816,468.22.

17. After appellant responded to the show cause order, the Board suspended proceedings in CBCA 4775. On April 15, 2016, appellant submitted an amended TSP to the CO, seeking \$12,816,466.22, the same amount appellant sought in its counter-offer dated January 29, 2015. Appeal File, Exhibit 50.

18. The amended TSP consisted of an eleven-page letter from appellant's counsel, a certification statement on the last page of the letter signed by appellant's president, and nine exhibits. The letter contained a narrative and the following references to the quantum of the claim:

As presented in the accompanying spreadsheets and the following discussion, NVS is entitled to a payment of \$13,956,197.82 (less the DHS termination interim payment of \$1,139,729.60) for a remaining outstanding amount owed to appellant of \$12,816,468.22<sup>14</sup> reflecting the value of the portion of work NVS completed under the Contracts [sic], NVS's increased costs of performance arising from the Government's changes to the manner and methods of performance, Government caused delays, NVS's costs arising from the Government's termination of the Contracts [sic], and NVS's damages arising from the Government's bad faith in terminating the Contract.

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Appellant submitted its initial termination settlement, in a Standard Form 1437, dated March 18, 2014, then asserting \$3,790,149.20 in claimed costs. R[ule] 4, Exhibit 24, copy enclosed as Exhibit 7. On February 1, 2015, appellant emailed . . . a revised termination settlement proposal (where the email called it a "counter-offer"); appellant was now seeking \$13,956,197.82 (less the DHS termination interim payment of \$1,139,729.60) for a remaining outstanding amount owed to appellant of \$12,816,468.22. R[ule] 4, Tab 38,

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<sup>14</sup> According to the claim letter, this amount is the sum of a) \$2,650,419.60, costs allegedly incurred during performance of the contract (the amount sought in appellant's original TSP, \$3,790,149.20, less the partial payment of \$1,139,729.60, Appeal File, Exhibit 50 at 7 n.2) and b) \$10,166,048.62, allegedly resulting from what appellant characterizes as respondent's alleged bad faith termination of the contract. *Id.* at 10-11. However, as the CO notes in his final decision in response to this amended TSP, this sum does not appear to take into account the amount of \$8,700,000 which is alleged to be the impact of constructive changes. *Id.* at 9.

copy enclosed as Exhibit 8.<sup>[15]</sup> The revised termination proposal included costs associated with the Government's bad faith refusal to add funds to the Contract and the subsequent termination for convenience. The revised proposal also included costs associated with NVS's modification in its anticipated manner and method of performance in the face of constructive changes imposed upon it by the Respondent's actions and directives. R[ule] 4, Tabs 24, 38.

Appeal File, Exhibit 50 at 1-2, 6.

19. The legal analysis portion of the letter contains the following references to the amounts claimed for 1) the Termination Settlement Proposal (\$2,650,419.60), Appeal File, Exhibit 50 at 7; 2) Government Caused Changes to the Contract (\$8,700,000), *id.* at 9; and 3) the Government's Bad Faith Termination of the Contract (\$10,166,048.22), *id.* at 11.<sup>16</sup>

20. On June 14, 2016, the CO issued a final decision denying appellant's amended TSP in its entirety and reasserting respondent's demand for \$606,771 due to overpayments. Appeal File, Exhibit 60. This decision read in part:

[Y]ou sent the Government a newly certified April 15, 2016, claim. Throughout your claim, you make multiple assertions, however I have been unable to determine that your claim and the additional documents supports additional payment by the Government.

Under the final paragraph of Section I — Factual Background (Page 6 of 11), you state “. . . appellant was now seeking \$13,956,197.82 (less the DHS termination interim payment of \$1,139,729.60) for a remaining outstanding amount owed to appellant of \$12,816,468.22. R[ule] 4, tab 38, copy enclosed as Exhibit 8. The revised termination proposal enclosed costs associated with the Government's bad faith refusal to add funds to the Contract and the subsequent termination for convenience. The revised proposal also included

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<sup>15</sup> Despite the representation in the letter, Exhibit 8 is not the previous counter-offer. It is a spreadsheet that totaled \$3,790,149.20, which was submitted with the initial TSP before the counter-offer. The CO's subsequent decision references this apparent error.

<sup>16</sup> As the CO notes in his subsequent final decision, the \$8,700,000 for Government Caused Changes to the Contract is not included in the total amount claimed of \$12,816,468.22, which appears to be the sum of the Termination Settlement Proposal (\$2,650,419.60) and the Government's Bad Faith Termination of the Contract (\$10,166,048.22).

costs associated with NVS's modification in its anticipated manner and method of performance in the face of constructive changes imposed upon it by the Respondent's actions and directives. R[ule] 4, tabs 24, 38." *The copy enclosed in this claim as Exhibit 8 does not support the assertion that NVS is entitled to a payment of \$12,816,468.22. Rather, Exhibit 8 is [a spreadsheet] entitled "NVS Technologies Settlement Proposal" and is dated February 20, 2014. The total settlement proposal in Exhibit 8 adds up to \$3,603,949.20.*

Under the last paragraph of Section II — Legal Analysis, Paragraph B — Government Caused Changes to the Contract (Page 9 of 11), you state, ". . . The cost impact of the Government's constructive changes is \$8,700,000 and up to 16 months delay." There is no documentation within this claim to support this assertion.

Under the last paragraph of Section III — The Government's Bad Faith Termination of the Contract (Page 10 of 11), you state, "As described in NVS's termination settlement proposal, dated January 31, 2015, Exhibit 8 hereto, NVS is entitled to a payment of \$10,166,048.62."

*Again, Exhibit 8 under this claim is [a spreadsheet] entitled "NVS Technologies Settlement Proposal" and is dated February 20, 2014. The total settlement proposal in Exhibit 8 adds up to \$3,603,949.20.*

*You close your claim with the statement that NVS is entitled to a payment of \$12,816,468.22. Again, nothing in this claim supports this assertion. While this total is not reflected in any of the supporting documentation under this claim, it does seem to be reflected in the counter-offer proposal and documentation from NVS dated January 31, 2015, and emailed to me on February 1, 2015 (see Rule 4 file, Binder #2, Exhibit 38).*

An analysis of your counter-offer was done by the DCAA and the terminating contracting officer and presented to NVS in the Final Determination of Termination of Cost under Contract Number HSHQDC-10-C-00053 letter dated May 22, 2015. Attachment 4 of that letter documented the analysis (See Rule 4 file, Binder #2, Exhibit 49).

After receipt of this most recent claim I again approached DCAA to review your January 31, 2015 counter-offer to determine if, in their professional opinion, anything had occurred to change their original evaluation. DCAA documented to me that their initial analysis and findings, *that NVS had*



*presented no basis to support the \$10,000,000 assertion for “Lost Opportunity Cost” and that NVS had not presented any detailed information on how they derived [sic] at a \$300,000 assertion for “Cost of Bad Credit,” remained unchanged.*

I have reviewed your entire claim package in search of documentation to support your assertion that Government acted in bad faith or with specific intent to harm NVS. In reviewing the package, I found nothing within the documentation that demonstrates anything approaching near irrefragable proof, or any evidence whatsoever, that the Government engaged in a campaign to damage and harass the NVS. The Office of Inspector General (OIG) Report (Exhibit 6) does make a case for poor program management of the contract, but nothing within the report indicated malice or intent by the Government to harm NVS.

Based upon the lack of supporting documentation for this claim, as well as the Government’s initial analysis of your January 31, 2015, dated counter-offer, I have determined that none of the costs offered under this claim are allowable, reasonable, or allocable under the cost principles as expressed under FAR Subpart 31. Therefore, I must deny your claim.

Appeal File, Exhibit 60 at 2-3 (emphasis added).

21. Thus, the CO noted in his decision that appellant did not include with its amended TSP the spreadsheet containing the dollar amounts and descriptions for the lost opportunity cost and the cost of bad credit which had accompanied its previous counter-offer. The only information that possibly referred to these costs was the various references in the amended TSP’s letter. There was no supporting documentation describing the derivation of these costs or demonstrating their calculation.

22. The June 14, 2016, the CO’s decision was appealed to this Board on the day it was issued, docketed as CBCA 5360, and consolidated with CBCA 4775.

23. On July 14, 2016, appellant filed its complaint in the consolidated appeals, again asking for relief in the amount of \$12,816,468.22, the same amount requested in the counter-offer, the amended TSP, and the complaint in the first appeal. When discovery was concluded, the Board issued a pre-hearing order which scheduled pre-hearing submissions for August 22, 2017, and a hearing on the merits to commence on September 12, 2017.

24. On August 22, 2017, appellant submitted its pre-hearing brief which stated with regard to lost profits:

NVS is due \$570,415 related to outstanding debt and obligations and \$281,967,625 in lost profits. See A[ppellant's] Supplemental R[ule] 4 [File], Tab 20, The Kenrich Group Damages Report . . . .

As described in the Kenrich Group Damages report . . . Appellant's damages are supported by contemporaneous records and the parties' expectations as to future sales . . . to both Government and commercial entities. . . Appellant respectfully requests that the Board enter judgment in the Appellant's favor [for] \$3,846,855 in allowable contract performance and termination costs related to its termination settlement proposals. Additionally, based on the Government's bad faith in terminating the Contract, the Board should enter judgment in NVS's favor in the amount of \$570,415 related to outstanding debt and obligations and \$281,967,625 in lost profits.

Appellant's Pre-Hearing Brief at 10, 19.

25. Appellant's supplemental appeal file, submitted with the pre-hearing brief, included a document entitled "Expert Report of Chelsea Taylor Cullum, The Kenrich Group, LLC" (the Kenrich Report), dated August 22, 2017. Appellant's Supplemental Appeal File, Exhibit 20.

26. The Kenrich Report states in its "Introduction":

Kenrich's work on this matter was performed by me, Chelsea Taylor Cullum, and other professionals working under my direct supervision. In reaching my opinions, I relied upon my training, education, and professional experience, as well as the various project-related documents and information provided by NVS personnel. . . . In addition, I considered the MAMTP Contract, NVS policies and procedures, and the Federal Acquisition Regulation ("FAR"), as well as auditing and investigative guidance found in the Defense Contract Audit Agency's ("DCAA") Contract Audit Manual ("DCAM").

.....

My opinions are based on an independent professional examination of documents and electronic information produced in this matter, discussions with NVS executives, and other sources described in this Expert Report and

attachments. The opinions contained in this Expert Report have been prepared on the basis of information and assumptions set forth in this Expert Report and attachments. My opinions are based on the information reviewed to date and are subject to change if new information becomes available.

[footnote 1] I currently anticipate (a) attending CBCA hearings to hear relevant witness testimony, (b) reading testimony transcripts that I may also rely on for my testimony at the CBCA hearing, and (c) receiving additional document production.

Appellant's Supplemental Appeal File, Exhibit 20 at 1, 2-3 & n.1.

27. In a paragraph entitled "Summary of Opinions," the Kenrich Report states:

Based on my review and analysis, NVS's damages due to the MAMTP Contract termination total \$3,846,855 in allowable contract performance and termination costs related to its TSPs. Additionally, assuming the assertions relating to bad faith included in NVS's complaint are established, NVS is due \$570,415 related to outstanding debt and obligations. Finally, I calculated \$281,967,625 in lost profits related to both Government and commercial sales.

Appellant's Supplemental Appeal File, Exhibit 20 at 5.

28. The Kenrich Report contains the phrase "lost opportunities" only once, in the following paragraph:

In February 2015, during TSP negotiations . . . NVS also submitted a "counter-offer" proposal totaling \$12,816,468. This proposal includes "lost opportunity costs" of \$10,000,000. This Report addresses the costs disallowed by the TCO related to NVS's two TSPs and its February 2015 counter-offer proposal. This report addresses *my calculations* of lost profits from NVS's projected sales of the Platform and consumables to both the U.S. Federal Government and commercial (i.e., non-U.S. Federal Government) entities.

Appellant's Supplemental Appeal File, Exhibit 20 at 4-5. (emphasis added).

29. The Kenrich Report consists of a forty-four page narrative, with a discussion of bad-faith damages on pages 30-42. Exhibit 6 of the report, entitled Bad Faith Damages—Lost Profits, contains sixteen spreadsheets. Attachment 1 of the report was a resume of Ms. Cullum, and attachment 2 listed eighty-nine documents relied upon to create the report. *Id.* These documents were filed electronically with the Board.