UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

RESPONDENTS' MOTION FOR SUMMARY JUDGMENT GRANTED;
APPELLANT'S MOTION FOR SUMMARY JUDGMENT DENIED: January 4, 2021

CBCA 6292, 6385, 6386, 6487, 6543, 6581, 6582, 6801

CSI AVIATION, INC.,

Appellant,

v.

DEPARTMENT OF HOMELAND SECURITY,

Respondent in CBCA 6292, 6385, 6581, and 6801.

and

GENERAL SERVICES ADMINISTRATION,

Respondent in CBCA 6386, 6487, 6543, and 6582.

Jason N. Workmaster, Caroline J. Watson, Alejandro L. Sarria, Marcus A. R. Childress, and Elizabeth J. Cappiello of Miller & Chevalier Chartered, Washington, DC, counsel for Appellant.

Cassandra A. Maximous, Andrew M. Wagner, and George Mathew, Office of the Principal Legal Advisor, Immigration and Customs Enforcement, Department of Homeland Security, Washington, DC; and Robert Metzgar, Office of the Principal Legal Advisor, Immigration and Customs Enforcement, Department of Homeland Security, Detroit, MI, counsel for Respondent in CBCA 6292, 6385, 6581, and 6801.

Sarah E. Park, Office of General Counsel, General Services Administration, Washington, DC, counsel for Respondent in CBCA 6386, 6487, 6543, and 6582.

Before Board Judges **DRUMMOND**, **KULLBERG**, and **CHADWICK**.

CHADWICK, Board Judge.

This matter is in an unusual procedural posture and requires the Board to apply an unusual legal standard. We granted a joint motion to consolidate in part eight appeals (which were already consolidated into four cases of two appeals each) to decide a common issue. Each appeal involves one or more task orders issued to the appellant, CSI Aviation, Inc. (CSI), by U.S. Immigration and Customs Enforcement (ICE), a component of respondent Department of Homeland Security, under a Federal Supply Schedule contract awarded to CSI by respondent General Services Administration (GSA). CSI and the respondents filed cross-motions for summary judgment on the common issue.

The issue we agreed to decide is whether a set of provisions known as the "CSI Terms and Conditions" were "incorporated in the GSA schedule contract, either at the formation of that contract or by modification of that contract." Because we conclude on the basis of the summary judgment record that there is at least room for doubt as to the answer to that question, we must answer the question in the negative as a matter of law. Accordingly, we grant the Government's motion and will proceed in the eight appeals having determined that the provisions at issue were not incorporated in the schedule contract.

Background

The following facts are undisputed except as noted.[1]

As we summarized in part in *CSI Aviation, Inc. v. General Services Administration*, CBCA 6543, 20-1 BCA ¶ 37,580, GSA awarded schedule contract GS-33F-0025V for air charter brokerage services and ancillary supplies and services to CSI in March 2009. The contract consisted in part of a standard form 1449 and an attachment titled, "Attachment to the Standard Form 1449." The attachment was two pages and had three numbered sections. The third section of the attachment stated:

> 3. The following documents are hereby incorporated and made part of the contract:

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[1] Except for the schedule contract, which is exhibit 6 in the appeal file of CBCA 6581, 6582, all of the cited documents are in the appeal file of CBCA 6292, 6386, where they are indexed "by date and content" in accordance with Board Rule 4(b)(6) (48 CFR 6101.4(b)(6) (2020)).

a. [A revised solicitation] dated February 10, 2009 . . . .
b. [Another solicitation] dated March 24, 2004 . . . .
c. Offer dated November 6, 2008.
d. [A wage determination.]
e. [Final proposal revision] letter dated March 9, 2009.
f. Revised Commercial Price List, submitted March 9, 2009.

Here we encounter our first dispute of fact. In its statement of facts in support of its motion, CSI states that the "November 6, 2008 Offer," referenced in the above list of incorporated documents from the attachment to the contract, "included a document entitled CSI Terms and Conditions dated 11/08." As support for this statement, CSI cites four pages of its offer, which is now attached to the schedule contract in GSA's contract file, and a sentence of deposition testimony. The cited evidence shows that a version of the CSI Terms and Conditions with "11/08" on each page was saved in GSA's contract file. As discussed below, this evidence does not establish beyond dispute that the version of this document saved in GSA's file was submitted with CSI's November 6, 2008, offer.

The GSA contract file clearly contains documents that were added at different times. The version of CSI's offer in the file has two signature pages, the earlier of which, dated November 6, 2008, is crossed out in pen with a large X across the page. The later signature page, which is not crossed out, is dated November *26*, 2008. The table of contents of CSI's offer—one of the pages that CSI now cites—bears no date and lists a subsection titled, "CSI Terms and Conditions (Standard Commercial Warranty)," also with no date.

The offer in GSA's contract file also contains two versions of a page titled,"CSI Pricing Policy," one of which is X'd out in pen and one of which is not. The page that is not crossed out reads in part:

Terms and Conditions:
- CSI Terms and Conditions, in other words, our Standard Commercial Warranty, will apply to all operations and are included for reference
- Delivery of services begins from point of aircraft base/origination
- Pricing conditions are further detailed in our CSI Commercial Pricelist

Next in the GSA contract file are three versions of a two-page "CSI Commercial Price List," two of which are marked in pen with a slash running from the upper right corner to the lower left corner, and one of which is stamped December 31, 2008. All of these versions of the commercial price list were later superseded by the March 9, 2009, revised version that immediately follows the "Attachment to the Standard Form 1449" in the contract file.

Next in the file is the document with the header, "CSI Terms and Conditions," which CSI cites in support of its statement of fact quoted above. This document closely resembles the one with the same header that we described in our April 2020 decision in CBCA 6543, cited above, except that this version in the contract file has "11/08" in the lower left corner of each page rather than "02/14." As is the case for each version of this document in the record, the three pages are numbered "3 of 5," "4 of 5," and "5 of 5." Again, this document is not stamped or otherwise marked with a date of transmission or receipt. CSI cites a 2020 deposition in which a former CSI employee, who signed CSI's proposal, testified, "Our supplemental offer dated November 6th, 2008, also reference[d] our terms and conditions, and include[d] a copy," but this witness did not identify a date of the "copy," nor does CSI point us to any testimony making clear whether this witness remembered submitting CSI's offer, twelve years after the fact, or was simply reciting CSI's allegations in this litigation.

In view of all of this evidence, we agree with the agencies that "[t]he contract file is unclear as to whether" the *version* of the CSI Terms and Conditions cited by CSI "was included with the November 6, 2008 Offer or [with] subsequent submissions after that date. For example, the 11/08 CSI Terms and Conditions appear in the contract file after a price list dated [December 2008]," and CSI replaced the offer's signature page on November 26, 2008. We would need to weigh evidence to determine when the cited document was submitted.

We now turn our attention to the March 9, 2009, revised commercial price list that is referenced in the attachment to the schedule contract. This price list consists of three pages. The first page and most of the second page show a schedule of hourly prices for various aircraft, identified by type, size, and number of seats. On the third page of the document, a paragraph reads in full:

> **Terms & Conditions**
> Period of performance longer than 30 days will incur bi-monthly billing (every 15 days). CSI Terms and Conditions 02/09, or most current, will apply to all operations.

CSI states that this "reference to 'CSI Terms and Conditions 02/09' was to a document that CSI provided to GSA on February 27, 2009." It appears to be true that CSI emailed such a document to GSA on that date (that is, another iteration of the CSI Terms and Conditions, but with "02/09" at the bottom of the pages), but it is not clear that the March 2009 commercial price list incorporated in the contract was referring to that *exact* version of the CSI Terms and Conditions. Again, without *specific* dates, version numbering (e.g., 1.0, 2.0), or some other form of version control, we cannot be certain. The agencies note that CSI submitted superseding proposal documents in March 2009. As support for its contention that it has identified the exact "02/09, or most current" version of the Terms and Conditions

that was referenced in the price list, CSI cites deposition testimony of two GSA contracting officers. Neither citation establishes the asserted fact. Both deponents testified in 2020 that, years after award, when preparing contracting officer's decisions, they believed that the iteration of the CSI Terms and Conditions referenced in the price list must have been the version in the contract file with "02/09" on each page. The cited testimony does not indicate *when*—or how many times, for that matter—GSA received the "02/09" document that it placed in the file. Even assuming that it is *likely* that CSI has pointed to the exact document to which the March 2009 commercial price list referred, that fact is neither undisputed nor obvious, and we would need to weigh evidence if this were a material factual issue.[2]

Between July 2009 and March 2015, CSI submitted to GSA at least eight updates of its commercial price list as parts of submissions asking GSA to modify aspects of the schedule contract. In each such submission, the updated commercial price list stated, "CSI Terms and Conditions . . . will apply to all operations," sometimes adding numerals indicating a month and a year after the word "Conditions" and sometimes adding the words "or most current." In at least one such submission, in June 2011, CSI again characterized the CSI Terms and Conditions as "[o]ur standard commercial warranty." None of the modifications resulting from these submissions added the CSI Terms and Conditions to the list of incorporated documents. CSI never drew GSA's attention to the language about the CSI Terms and Conditions in the price lists, and GSA never objected to that language.

GSA admitted in discovery that from August 2011 until at least 2014, the applicable CSI price schedule publicly available on a GSA website stated, "CSI Terms and Conditions 11/10, or most current, will apply to all operations."

In September 2013, as part of a request for an extension of the schedule contract, CSI submitted a five-page form titled, "CSP-1[,] Commercial Sales Practices Format." On the second page of this form was a paragraph beginning, "CSI's Commercial Pricing Policy is summarized below," followed by seven bullet points, the seventh of which had four bulleted subpoints. The fourth and final subpoint of the seventh and final bullet point was, "CSI Terms and Conditions (most current) will apply."

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[2] For reasons discussed below, we consider parol evidence of pre-award discussions immaterial to the cross-motions. We note, however, that a week before awarding the schedule contract, GSA asked CSI whether its Terms and Conditions were intended as "requirements for ordering agencies to comply with," and CSI replied, "Regarding the Terms and Conditions, they were just provided for your information." The agencies argue that this disavowal of contractual effect is "clear on its face."

In correspondence with GSA from 2013 to 2015 about extending the schedule contract, CSI emailed GSA multiple proposed price lists containing the sentence, "CSI Terms and Conditions will apply to all operations." In August 2015, the parties bilaterally extended the schedule contract. CSI does not contend that the extension modification referred specifically to a particular commercial price list or to the CSI Terms and Conditions.

In December 2015, GSA and CSI bilaterally modified the schedule contract to add a new schedule item number (SIN). The price list that CSI subsequently uploaded to GSA's eMod system for that particular SIN stated on the sixth of seven pages, "CSI Terms and Conditions will apply to all operations."

CSI offers a number of additional factual statements regarding proposals and negotiations that led to a further extension of the schedule contract in 2019. GSA generally disputes CSI's characterizations of those communications. We have already ruled that evidence of such "conversations [up to] a decade after award does not necessarily illuminate 'the parties' intent at the time the [schedule] contract was executed,' the aim of contract interpretation.' *ASP Denver, LLC v. General Services Administration*, CBCA 2618, et al., 15-1 BCA ¶ 35,850 (2014)." *CSI Aviation*, 20-1 BCA ¶ 37,580; *see also* Board Rule 25(a) (a Board decision "is conclusive as to the matters it resolves"). Furthermore, all of the cited exchanges took place after ICE placed the task orders that are at issue in the eight appeals that we are addressing here. We decline to sort out the parties' disagreements about their communications about the 2019 extension, especially as such evidence could not affect our analysis, below, of the common issue before us.

Discussion

We are satisfied that we have jurisdiction under the Contract Disputes Act, 41 U.S.C. § 7105(e)(1)(B) (2018), in the four cases that the parties are litigating at the Board, consisting of the eight appeals here consolidated in part.[3] As noted, we granted a joint motion to consolidate the appeals in part, solely to decide "whether the CSI Terms and Conditions were incorporated in the GSA schedule contract, either at the formation of that

[3] In each of the four cases, CSI submitted one certified claim to both GSA and ICE and separately appealed two denials. We grouped the appeals by claim. "The issue of which appeal is properly before us in [each such] consolidated case" under *Sharp Electronics Corp. v. McHugh*, 707 F.3d 1367 (Fed. Cir. 2013), "has little practical significance for now and is, as a legal matter, neither so urgent that we must decide it now nor so obvious that we [could previously] decide it on the existing record." *Avue Technologies Corp. v. Department of Health & Human Services*, CBCA 6360, et al., 20-1 BCA ¶ 37,503, *quoted in CSI Aviation, Inc. v. Department of Homeland Security*, CBCA 6581, et al., 20-1 BCA ¶ 37,519.

contract or by modification of that contract." CSI and the Government (acting through both agencies) filed cross-motions for summary judgment on the common issue in November 2020 and filed briefs until December 2020. CSI argues that the Terms and Conditions "were included in the Contract in full text" at award or "were incorporated by reference into the Contract at the time of award." The respondent agencies disagree.

In resolving the motions, we "must view the evidence presented through the prism of the substantive evidentiary burden" while drawing any factual inferences in favor of a nonmovant. *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 254 (1986); *see Enzo Biochem, Inc. v. Gen–Probe, Inc*., 424 F.3d 1276, 1284 (Fed. Cir. 2005). "Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." *Anderson*, 477 U.S. at 248.

CSI's substantive burden here is unusually demanding. In *Northrop Grumman Information Technology, Inc. v. United States*, 535 F.3d 1339 (Fed. Cir. 2008), the Court of Appeals, drawing in part from holdings in its patent decisions, held that "to incorporate material [in a contract] by reference, the host document must identify with detailed particularity what specific material it incorporates and clearly indicate where that material is found in the various documents" at issue. *Id*. at 1344 (internal quotation marks omitted). "In other words, the incorporating contract must use language that is express and clear, so as to leave no ambiguity about the identity of the document being referenced, nor any reasonable doubt about the fact that the referenced document is being incorporated into the contract." *Id*. It appears that our Board has never found a disputed document to be incorporated in a contract by applying this test. *E.g.*, *CAE USA, Inc. v. Department of Homeland Security*, CBCA 4776, 16-1 BCA ¶ 36,377; *Kiewit-Turner v. Department of Veterans Affairs*, CBCA 3450, 15-1 BCA ¶ 35,820.

In *Northrop Grumman Information Technology* itself, the Court held that a "letter of essential need" was not incorporated in a contract by way of expressly incorporated "terms and conditions" because "the Terms and Conditions d[id] not refer to the Letter of Essential Need explicitly, as by title or date, or otherwise in any similarly clear, precise manner" and, in any event, "d[id] not clearly *incorporate* the referenced material. Rather, the Terms and Conditions merely recount that 'the Government has provided' the required information 'as inducement for Contractor entering into this Agreement.'" 535 F.3d at 1346–47. The Court reasoned that such a "recital is 'hardly the type of clause that should be read as incorporating fully into the contract' some extrinsic text containing additional contract terms." *Id*. at 1347 (quoting *Smithson v. United States*, 847 F.2d 791, 794 (Fed. Cir. 1988)).

The question presented here, therefore, is not simply whether, on balance, we should read the schedule contract as including the CSI Terms and Conditions—nor is it even

whether we see enough ambiguity in the contract, the associated documents, and the parties' communications to conclude that CSI might be able to convince us at a hearing that CSI and GSA formed a mutual intent to incorporate the CSI Terms and Conditions. Instead, the issue is whether the contract was "*express and clear*, so as to leave *no ambiguity* about the identity of the" provisions "being referenced, *nor any reasonable doubt* about the fact that" the CSI Terms and Conditions were not merely referenced but were "*incorporated into* the contract." *Northrop Grumman Information Technology*, 535 F.3d at 1344 (emphasis added).

Under this legal standard, moreover, it is difficult to imagine *not* ruling summarily for one side or the other here. Either the language of the schedule contract satisfies the test for incorporating the CSI Terms and Conditions or it does not. If it does, CSI should prevail on the common issue; if it does not, the agencies should. It would be difficult to posit grounds to deny both motions and to hold a factual hearing to decide whether the contract was clear enough to leave no reasonable doubt about the outcome.

Neither CSI nor the agencies meaningfully discuss *Northrop Grumman Information Technology* in their briefs. CSI cites the decision once in its moving brief and zero times in its reply.[4] We see at least three problems with CSI's arguments in favor of incorporation.

First, the schedule contract included a list of six documents that were "hereby incorporated and made part of the contract"—but the CSI Terms and Conditions never appeared in that list. The use of the express list "demonstrates" that the parties were "familiar with language of incorporation and likely would have used the same or similar language . . . had there been an intention to incorporate [other documents] into the contract." *Tip Top Construction*, PSBCA 6351, 11-1 BCA ¶ 34,726; *accord Northrop Grumman Information Technology*, 535 F.3d at 1347 n.1. Several months before CSI and GSA formed the schedule contract, the Federal Circuit "stress[ed] that parties contracting with the government may easily avoid or at least minimize the risk of having to litigate [incorporation] by simply adopting widely-used and judicially-approved language of incorporation, such as 'is hereby incorporated by reference' or 'is hereby incorporated as though fully set forth herein[.]'" *Northrop Grumman Information Technology*, 535 F.3d at 1346. That CSI and GSA acted in accordance with the Court's guidance with regard to six

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[4] The parties spend more time on *CiyaSoft Corp.*, ASBCA 59519, et al., 18-1 BCA ¶ 37,084, a nonbinding decision which we do not find instructive here because the board there did not apply *Northrop Grumman Information Technology* and ruled that a contract for software "licenses" included a commercial licensing agreement by regulation.

documents, but not as to the CSI Terms and Conditions, *at least* raises doubt about whether they intended to incorporate the CSI Terms and Conditions.[5]

Second, although CSI asserts that the CSI Terms and Conditions were "included" in its November 6, 2008, offer and were "referenced" in its March 2009 commercial price list —both of which were expressly incorporated in the schedule contract at award—neither CSI's offer nor its commercial price list referred to the CSI Terms and Conditions using express, clear language of incorporation, especially if the Terms and Conditions are viewed as a *pricing* addendum (which is the thrust of CSI's appeals).

In the table of contents of its offer, CSI listed the CSI Terms and Conditions with the parenthetical, "(Standard Commercial Warranty)." Such a warranty, if applicable, would presumably bind CSI but not GSA. *E.g.*, *Ucensys Research Corp. v. Nuclear Regulatory Commission*, CBCA 4241, 19-1 BCA ¶ 37,402. CSI repeated its description of the Terms and Conditions as, "in other words, our Standard Commercial Warranty" in the pricing policy that is now in GSA's contract file. The logical place to set forth the pricing under the schedule contract was in the commercial price list. But in that list, at contract formation, CSI again did not clearly or expressly identify the CSI Terms and Conditions as binding on both parties. CSI only stated there, "CSI Terms and Conditions 02/09, or most current, will apply to all operations." We have already ruled that this sentence was ambiguous, and we see no reason to change our view. "No language in the price list advises a reader to consult any other document to find additional prices," and "all operations" "does not unambiguously mean 'all other pricing issues.' It *could* mean that, but it could alternatively refer to something else, such as logistical operations." *CSI Aviation*, 20-1 BCA ¶ 37,580. Stated differently, "will apply to all operations" is not "'the type of [phrase] that should be read as [expressly] incorporating fully into the contract' some extrinsic text containing additional contract terms." *Northrop Grumman Information Technology*, 535 F.3d at 1347 (quoting *Smithson*, 847 F.2d at 794). This is especially true given that, in the same offer, CSI described the CSI Terms and Conditions as simply a "Standard Commercial Warranty."

We think these first two flaws in CSI's position suffice to show that the CSI Terms and Conditions were not incorporated in the schedule contract at award. By identifying a *third* problem, we do not mean to suggest that we think either of the first two could be overcome. Nonetheless, even if one assumes that a reader of the schedule contract might have no "reasonable doubt" that something called the CSI Terms and Conditions were

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[5] CSI argues that GSA had a "duty to inquire" about what was or was not incorporated in the schedule contract. We do not see how such a duty could possibly arise given the standard for incorporation set forth by the Federal Circuit, which requires that the contract be unambiguous.

"incorporated into the contract," CSI still could not prevail, due to the residual "ambiguity about the identity of the document being referenced." *Northrop Grumman Information Technology*, 535 F.3d at 1344. CSI's own arguments make clear that the CSI Terms and Conditions were a moving target or, to be more charitable, a living document.

While we are not experts in patent law, we gather from the decisions in which the Federal Circuit developed the incorporation standard set forth in *Northrop Grumman Information Technology* that the core inquiry in the patent context is whether "one reasonably skilled in the art" would see that "the host document describes the material to be incorporated by reference with sufficient particularity" to facilitate pursuing the art. *Advanced Display Systems, Inc. v. Kent State University*, 212 F.3d 1272, 1282 (Fed. Cir. 2000), *quoted in Zenon Environmental, Inc. v. U.S. Filter Corp.*, 506 F.3d 1370, 1378 (Fed. Cir. 2007); *see, e.g.*, *Hollmer v. Harari*, 681 F.3d 1351, 1358 (Fed. Cir. 2012) ("[O]n its face, the incorporation language does not directly lead one of ordinary skill to [another patent] application but rather presents several potential documents for incorporation."). We think the analogous question here is whether the schedule contract referred to the CSI Terms and Conditions with enough particularity that a person of ordinary skill in government contracting would have no difficulty in finding the specified document to consult it.

After reviewing the summary judgment papers, however, we still could not locate without doubt the "most current" version of the CSI Terms and Conditions at any juncture from March 2009 to 2019. Could the most current version change from day to day? Week to week? Was there one custodian at CSI, or more than one? We do not know. Certainly, nothing in the text of the schedule contract provides such information.

In October 2019, in earlier briefing in CBCA 6543, CSI argued that it "was not required to publish the full text of its Terms and Conditions . . . or to ensure that" an ordering agency such as ICE "was subjectively aware of them." CSI argued then that it had no obligation to "display the full text of its Terms and Conditions" anywhere in order to make them part of the schedule contract. In making that argument, CSI essentially admitted that it had no *subjective* intent to remove all reasonable doubt about the location or the contents of the "current" CSI Terms and Conditions at any given time.

CSI now argues that it was the agencies' fault that they did not keep track of the "most current" versions of the CSI Terms and Conditions. "[T]hat CSI did not include the full text of its Terms and Conditions" in correspondence after award, "attach them to its post-award price lists, or publish them publicly," CSI argues, "is irrelevant. If GSA . . . or ICE . . . had thought that any of this was an issue, they had numerous opportunities" to ask CSI what the Terms and Conditions said. "Their failure to do so demonstrates that they did not consider this [lack of disclosure] an issue requiring their follow-up, and they have now waived any

argument to the contrary . . . ." We do not read the test for incorporation in *Northrop Grumman Information Technology* as leaving room for such a waiver argument. Applying that decision, we do not ask who is responsible for reasonable doubt relating to incorporation, but whether such doubt exists. Thus, it is incumbent on a party wishing to incorporate a document to ensure there can be no doubt or mistake about the contracting parties' mutual intent in that regard. By choosing not to reveal the "most current" version of the CSI Terms and Conditions to the Government on a continuous basis, CSI created "ambiguity about the identity of the document being referenced" and defeated its own aim. *Northrop Grumman Information Technology*, 535 F.3d at 1344.

Although the parties agreed that the question common to the eight appeals included the issue of whether the CSI Terms and Conditions were incorporated in the schedule contract "by modification," CSI did not point to a relevant modification in its summary judgment motion. In later briefs, CSI belatedly argued that modifications in August 2011 and December 2015 incorporated the CSI Terms and Conditions because those modifications expressly incorporated CSI price lists which said that "CSI Terms and Conditions" would "apply to all operations." To the extent that CSI did not forfeit this argument, what we have said above suffices to explain why we reject it. More generally, no matter how many times CSI repeated variations of "CSI Terms and Conditions (or most current) will apply to all operations" over the years, the meaning of that sentence became no clearer and never rose to the level of unmistakable clarity required to incorporate a document in a contract.

Decision

The Board **GRANTS** the respondents' motion for summary judgment and **DENIES** CSI's motion. The Board will issue separate orders on further proceedings in the four underlying consolidated cases.

Kyle Chadwick
KYLE CHADWICK
Board Judge

We concur:

Jerome M. Drummond
JEROME M. DRUMMOND
Board Judge

H. Chuck Kullberg
H. CHUCK KULLBERG
Board Judge