UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

DENIED: June 15, 2021

CBCA 6906

MERIDIAN GLOBAL CONSULTING, LLC,

Appellant,

v.

DEPARTMENT OF HOMELAND SECURITY,

Respondent.

Ryan C. Bradel and Stephen G. Darby of Ward & Berry, PLLC, Washington, DC, counsel for Appellant.

Keri Borzilleri and Matthew Lane, Office of Chief Counsel, Federal Emergency Management Agency, Department of Homeland Security, Washington, DC, counsel for Respondent.

Before Board Judges **LESTER** (presiding), **VERGILIO**, and **CHADWICK**.

Opinion for the Board by Board Judge **CHADWICK**. Board Judge **LESTER** concurs.

**CHADWICK**, Board Judge.

The appellant, Meridian Global Consulting, LLC (MGC), seeks compensation from the respondent, Department of Homeland Security (DHS), for a course of events in which the Federal Emergency Management Agency (FEMA) ordered fewer hours of security guard services than the number of hours that FEMA had set forth as the estimates in a labor-hour contract. Following discovery, both parties seek summary judgment. We grant DHS's motion, deny MGC's, and deny the appeal.

## Background

Except as noted, the material facts supported by the record are undisputed. FEMA and MGC executed the contract in December 2018. The standard form 1449 described the contract as "a labor hour contract with fixed hourly labor rates (fully burdened) as set forth in the contract line item numbers (CLINs)," for Department of Labor (DOL) level II armed security guard services at three "FEMA sites in Louisiana." (We alter the contract's capitalization for readability.) The contract's schedule of services contained one CLIN for the base period of performance, from February 1 to March 31, 2019, and one CLIN for each of seven, three-month option periods, potentially ending on December 31, 2020. A final CLIN provided for a one-month option period in January 2021. The base CLIN stated an "estimated number of hours" of 10,572. Each option CLIN except the last one stated an "estimated number of hours" of 15,120. In each CLIN, the total estimated value of the CLIN—the estimated hours times the hourly rate—was identified as "the not to exceed amount" of that CLIN. Every CLIN stated, "contractor shall invoice based on actual hours."

We do not know how FEMA developed its estimates of labor hours. Neither party placed such evidence in the record. Nor can we say whether, or to what extent, MGC relied on FEMA's estimates in developing its price of $24.40 per labor hour (which FEMA increased during performance to $26.24 based on a subsequent DOL wage determination). MGC's statement of facts in support of its motion starts with a paragraph purporting to describe how MGC "determined" the overhead and profit rates for its bid, but the paragraph is entirely conclusory, citing no "appeal file exhibits, admissions in pleadings," or "evidence filed with the motion," as required by Board Rule 8(f)(1) (48 CFR 6101.8(f)(1) (2019)).

FEMA ultimately exercised, and MGC performed, all eight options, through January 2021. MGC invoiced for 61,856.96 hours of contract services, as compared to an estimated total of 121,452 hours that had been set forth in the awarded contract for the base period plus eight option periods.[1] During performance, however, MGC signed without objection seven bilateral modifications exercising options, which cumulatively reduced the total, estimated number of labor hours to 77,040.[2] The 61,856.96 hours billed by MGC are 51% of the

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[1] Apparently in reliance on the solicitation, MGC states that the total number of estimated hours was originally 126,000. DHS denies that MGC states the correct estimate for the base period. The sum of the estimates in the awarded CLINs is in fact 121,452 hours.

[2] The bilateral modifications that reduced the estimated hours were modifications P00004, P00005, P00006, P00007, P00008, and P00009. Bilateral modification P00003 increased the estimated hours. FEMA issued a unilateral modification further reducing the estimated hours for the last option period. Given the contract language specifying payment for actual hours, these modifications do not affect our decision.

originally estimated labor hours and 80% of the estimated labor hours taking into account the seven bilateral modifications.

In February 2020, during the fourth option period, MGC sent the contracting officer a certified claim seeking $96,672.12 for services already provided plus an increase in its hourly rate to $27.28 for future work. MGC asserted that FEMA had ordered only 8850 of the estimated hours for the base period and that, by exercising options including lower estimated hours than had been stated in the contract, FEMA had impaired MGC's ability to recover its overhead. MGC characterized the differences between the originally estimated and the ordered or currently estimated numbers of labor hours as, alternatively, a partial termination for convenience, a constructive change, a breach of FEMA's duty to disclose superior knowledge, and/or as the provision of negligent estimates. The contracting officer denied the claim in July 2020, writing that the contract estimates "were based on the best information available to FEMA at the time." MGC filed this appeal in August 2020.

The parties conducted discovery until January 2021 and filed cross-motions for summary judgment in February 2021. The motions are fully briefed.

## Discussion

We apply the familiar summary judgment standard. *E.g.*, *Mingus Constructors, Inc. v. United States*, 812 F.2d 1387, 1390–91 (Fed. Cir. 1987); *Mission Support Alliance, LLC v. Department of Energy*, CBCA 6477, 20-1 BCA ¶ 37,657. MGC advances four theories of relief: (1) the bilateral modifications reducing the estimated labor hours constituted partial terminations for convenience; (2) FEMA constructively changed the contract by eliminating locations and reducing the number of guard positions, thereby reducing the number of labor hours it ordered; (3) FEMA negligently prepared the contract estimates; and (4) FEMA committed a breach by not disclosing its "superior knowledge" that it might not require all of the estimated services.[3] We address these arguments using the usual rules of contract interpretation, which "are well settled and without need of elaborate reiteration." *ITT Arctic Services, Inc. v. United States*, 524 F.2d 680, 684 (Ct. Cl. 1975). In particular, where a contract "is unambiguous, we follow the plain meaning without considering extrinsic evidence or related arguments." *P.K. Management Group, Inc. v. Secretary of Housing & Urban Development*, 987 F.3d. 1030, 1033 (Fed. Cir. 2021).

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[3] To the extent that MGC raises other arguments, such as that FEMA breached the duty of good faith and fair dealing in administering the security clearance process, we lack jurisdiction to entertain such arguments, as neither they nor their operative facts were presented in a certified claim. *See Lee's Ford Dock, Inc. v. Secretary of the Army*, 865 F.3d 1361, 1369 (Fed. Cir. 2017).

MGC's first and second arguments fail because the contract contained no guarantee that FEMA would order a fixed quantity of services. The parties formed a commercial-item, labor-hour contract. *See* 48 CFR 12.207(b)(2)(ii) (2018) (authorizing use of a labor-hour contract only if the agency cannot "accurately estimate [at award] the extent or duration of the work or . . . anticipate costs with any reasonable degree of confidence"). The contract plainly stated that FEMA would pay the agreed rate for such services as it ordered and that MGC must invoice only for actual hours. The estimated CLIN values were identified as maximum, "not to exceed" amounts, not as floors. The estimates of labor hours served purposes related to funding the contract and to placing ceilings on FEMA's orders, but such amounts plainly labeled as "estimates" cannot be read as "guarantees or warranties of quantity." *Shader Contractors, Inc. v. United States*, 276 F.2d 1, 7 (Ct. Cl. 1960); *accord Seaboard Lumber Co. v. United States*, 308 F.3d 1283, 1302 (Fed. Cir. 2002). Because the contract clearly did not obligate FEMA to use every available labor hour, MGC cannot demonstrate either a "termination" of any obligations or a constructive change.[4]

Turning to MGC's third argument, we need not and do not decide whether a contractor could, in principle, recover for faulty estimates under a contract with these terms.[5] We need not reach that unsettled issue because MGC proffers no evidence that could satisfy its burden to "demonstrate that the approach actually selected by the [FEMA] estimator was an unreasonable one." *Contract Automotive Repair & Management v. General Services Administration*, GSBCA 13627, et al., 99-2 BCA ¶ 30,530 (citing *Medart*, 967 F.2d at 581–82), *aff'd*, 243 F.3d 563 (Fed. Cir. 2000) (table); *see also Walker v. Department of Agriculture*, CBCA 2131, et al., 18-1 BCA ¶ 36,921 (the contractor "did not present evidence

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[4] We note that it is not immediately clear that this contract contained the minimum quantity guarantee which typically makes such an open-ended agreement enforceable. *See Coyle's Pest Control, Inc. v. Cuomo*, 154 F.3d 1302, 1304 (Fed. Cir. 1998); *Maxima Corp. v. United States*, 847 F.2d 1549, 1557 (Fed. Cir. 1988); *ASW Associates, Inc. v. Environmental Protection Agency*, CBCA 2326, 17-1 BCA ¶ 36,699. We need not explore the possible ramifications of this observation, however, as MGC's claim and arguments focus on the expressly stated "estimates," not on the presence or absence of a stated minimum quantity, and the contract is enforceable to the extent performed. *ASW*.

[5] Our appellate authority has addressed the viability of negligent estimate claims under indefinite quantity contracts, *Travel Centre v. Barram*, 236 F.3d 1316, 1319 (Fed. Cir. 2001) (explaining that the contractor "could not have had a reasonable expectation" of revenue exceeding the minimum guarantee "[r]egardless of the accuracy of the estimates"), and under requirements contracts. *E.g.*, *Medart, Inc. v. Austin*, 967 F.2d 579, 581 (Fed. Cir. 1992). We lack such definitive precedent applicable to this labor-hour contract with commercial terms. *Cf.* John Cibinic, Jr., Ralph C. Nash, Jr., & Christopher R. Yukins, *Formation of Government Contracts* 1323 (4th ed. 2011).

of a negligent estimate"). The mere fact that the estimates did not pan out does not imply that they were unreasonable when made. MGC cannot avoid summary judgment on this theory by relying on mere "allegations without evidence, which fail to set forth specific facts showing that there is a genuine issue of material fact." *Microtechnologies LLC v. Department of Justice*, CBCA 6772 (Mar. 31, 2021); *see GAF Corp. v. United States*, 932 F.2d 947, 949 (Fed. Cir. 1991) (a claimant must "produce specific evidence" for the claim elements when opposing summary judgment).

MGC's superior knowledge theory fails for essentially the same reasons. MGC's argument here has two parts. First, MGC complains that the contract start date and the duration of the base period differed from the dates that FEMA had used in the solicitation. MGC waived or forfeited any such reliance on the solicitation when it accepted the dates in the awarded contract. *See Brawley v. United States*, 96 U.S. 168, 173 (1877) (an executed contract "merge[s] all previous negotiations, and is presumed, in law, to express the final understanding of the parties"); *SCM Corp. v. United States*, 595 F.2d 595, 598 (Ct. Cl. 1979) ("When legal obligations between the parties will be deferred until the time when a written document is executed, there will not be a contract until that time."). Second, MGC maintains that FEMA knew or should have known before award that its need for the guard services would decline during the two years covered by the contract. Again, however, we see no evidence that could support a triable claim that FEMA had advance knowledge or notice that the contract estimates would eventually turn out to be too high. MGC's assertions that FEMA must have had such awareness by virtue of its agency mission are conclusory.

The respondent is entitled to summary judgment in all respects. Accordingly, we grant DHS's motion and deny MGC's motion.

Decision

We **DENY** the appeal.

Kyle Chadwick
KYLE CHADWICK
Board Judge

I concur:

Joseph A. Vergilio
JOSEPH A. VERGILIO
Board Judge

**LESTER**, Board Judge, concurring.

I concur with the result in this appeal. I agree with the majority's determination that, because the contract did not guarantee that the Federal Emergency Management Agency (FEMA) would order all of the contract's estimated labor hours, appellant, Meridian Global Consulting (MGC), cannot prevail on its arguments that FEMA either partially terminated or constructively changed the contract merely because FEMA ultimately ordered less than all of the estimated hours. I also agree with the majority that MGC has failed to identify any evidence that FEMA's labor hours estimates were negligently prepared or that FEMA withheld any superior knowledge that it was required, but failed, to disclose prior to contract award, entitling the Government to summary judgment on those issues.

I write separately because of my view that, as I explain below, the majority decision does not adequately address or resolve an issue that I believe must be decided to resolve this appeal fully.

Supplemental Undisputed Facts

The contract at issue here, which the parties executed on December 21, 2018, required MGC to provide armed security guard services at disaster-related sites and facilities in Baton Rouge, Louisiana. As the majority notes, it was a commercial-item labor-hour contract. It provided that services would be needed at three specific sites – a group site that was then housing disaster survivors in mobile housing units (MHUs) until the survivors' homes were repaired and habitable; a storage site housing empty MHUs until needed in the field; and an office building being used by FEMA employees – and that FEMA could order guard services at other, then-unidentified sites during the term of the contract. Appeal File, Exhibit 2 at 38.[6] For the base period of performance (CLIN 0001), which ran from February 1 through March 31, 2019, FEMA estimated that it would order 10,572 labor hours; for each of seven option periods, each of which contemplated ninety-day additional periods of performance (CLINs 1001 through 7001), FEMA estimated 15,120 labor hours per period; and, for a final option for a thirty-day performance period (CLIN 8001), FEMA estimated 5040 labor hours. Exhibit 1 at 2-6; Exhibit 2 at 38; Exhibit 5 at 81; Exhibit 22.[7]

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[6] Except where otherwise noted, all exhibits referenced in the concurrence are found in the appeal file.

[7] MGC complains that the solicitation on which it bid contemplated a longer base period – from January 1 through March 31, 2019 – with a 15,120 labor hours estimate but that delays in the contract award reduced that period by thirty-one days with a resulting reduction in the estimated labor hours. MGC executed the contract, with its reduced base period, without objection, and I agree with the majority that MGC cannot complain now

When FEMA exercised the first ninety-day performance option under the contract, it increased the estimated labor hours for that option period from 15,120 to 15,444, and MGC executed a bilateral modification accepting that option exercise without objection. Subsequently, however, FEMA issued a task order reducing guard coverage at one of its sites and, on April 10, 2019, issued a bilateral modification, which MGC executed (again without objection), reducing the estimated labor hours for the previously executed first option period by 2160 to 13,284 hours. Exhibit 10 at 127-28.

FEMA subsequently continued exercising the contract's performance options but, as the group housing site and later the storage site were closed, reduced the estimated labor hours in each of its option exercises below that which the contract identified. In its exercise of the second performance option, extending contract performance through the end of September 2019, FEMA identified an estimated number of 11,208 labor hours, a reduction of 3912 hours from the 15,120 estimate in the contract for that option period. The third option exercise, extending performance through December 31, 2019, was for 7896 estimated labor hours, a reduction of 7224 hours from the contract's 15,120 labor-hour estimate. In response to both option exercises, however, MGC executed bilateral modifications, dated June 26 and September 25, 2019, accepting the option exercises without objection. *See* Exhibit 11 at 129-30; Exhibit 12 at 131-32.

By email dated December 2, 2019, MGC complained to the FEMA contracting officer about what it described as a significant reduction in the number of hours anticipated. The contracting officer responded that the labor hours identified in the contract were only estimates, not guarantees, and presented MGC with a draft bilateral modification (P00007) to exercise the fourth option period (extending contract performance through March 31, 2020), but with estimated labor hours of only 4719. Exhibit 13 at 133-34. On December 31, 2019, MGC submitted a request for equitable adjustment (REA), asserting that the reduction of estimated labor hours from 15,120 to 4719 in exercising the fourth option (through modification P00007) would reduce the original scope of work set forth in the contract by nearly 70% and, in MGC's opinion, constituted a constructive partial termination for convenience. As a remedy, MGC asked that FEMA formally increase the fully-burdened contractual labor-hour rate to a rate of $33.67 per hour. Exhibit 17. The next day, MGC's president executed bilateral modification P00007 without further comment. Exhibit 13 at 133-34.

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about a "change" that occurred prior to, and is incorporated within, the contract as executed. *See, e.g.*, *K-W Construction, Inc. v. United States*, 671 F.2d 481, 484 (Ct. Cl. 1982); *SCM Corp. v. United States*, 595 F.2d 595, 598 (Ct. Cl. 1979).

The FEMA contracting officer denied the REA on January 29, 2020. Exhibit 18. Subsequently, on February 20, 2020, MGC submitted a certified claim to the contracting officer seeking $96,672.12 in "back pay" for work already performed and an increase in its hourly rate to $27.28 going forward for any further work to be performed under the contract. Exhibit 19 at 6. MGC asserted that, based upon the estimates in the solicitation and resulting contract, it needed to hire forty-two guards to perform the estimated work, as well as a full-time project manager to manage the project, costs that it had factored into the hourly rate of $24.40 (later increased to $26.24 as a result of new DOL wage determinations) that it had included in its bid, along with allocations for time that other company executives would dedicate to the project and general and administrative expenses. It complained that FEMA had only given it 8850 hours of performance during the contract's base period, rather than the 15,120 hours identified in the original solicitation, and that, in exercising the second, third, and fourth options with much lower estimated hours than set forth in the contract, FEMA had negatively impacted MGC's ability to recover its overhead. As the legal basis for its right to recover, MGC argued that the reduction in estimated labor hours resulted in a partial termination for convenience, a constructive change, a breach of FEMA's duty to disclose superior knowledge, and/or a breach of FEMA's duty not to provide negligent estimates.

On March 26, 2020, while MGC's claim was pending before the FEMA contracting officer, the parties executed bilateral modification P00008 through which FEMA exercised the fifth option period, extending contract performance through June 30, 2020. In the modification, FEMA capped the estimated labor hours for the fifth option period at 4719 hours, rather than the 15,120 hours identified in the contract. Exhibit 14 at 135-36. Through bilateral modification P00009, executed June 30, 2020, FEMA exercised the sixth option period, extending contract performance through September 30, 2020, with estimated labor hours of 4782, rather than the 15,120 hours identified for that option period in the contract. Exhibit 15 at 137-38.

By decision dated July 17, 2020, the FEMA contracting officer denied MGC's February 20 claim, asserting that the labor-hour estimates identified in the solicitation "were based on the best information available to FEMA at the time." Exhibit 20 at 4. On August 25, 2020, MGC filed this appeal of that decision with the Board. Both parties subsequently filed cross-motions for summary judgment.

While this appeal was pending, FEMA issued unilateral modifications P00010 and P00011, exercising the seventh option period to extend the contract performance period through December 30, 2020, with an estimated number of labor hours of 4782 (rather than 15,120) to be provided solely at the office building housing FEMA employees. Appellant's Summary Judgment Motion (Feb. 1, 2021), Exhibit 3.

From the start of the contract through February 1, 2021, the date on which MGC filed its summary judgment motion, MGC expended 61,856.96 hours on the contract, a figure below the 126,000 estimated labor hours (assuming exercise of all options) identified in the contract's solicitation. Appellant's Summary Judgment Motion, Exhibit 5.

## Discussion

There are two issues that I believe are raised by the claim underlying this appeal and the pleadings that, in my opinion, the majority decision does not fully address. First, the Government has questioned the extent to which a contractor could ever pursue a negligent estimates claim under the type of commercial-item labor-hour contract at issue in this appeal, assuming that the contract at issue here does not guarantee the contractor any work beyond what the Government actually orders. Second, if we assume that a negligent estimates theory could potentially be viable here because the contract entitles the contractor to something more than a minimum guaranteed quantity of work, we would have to consider whether FEMA effected a constructive change when it exercised option periods under this contract, but changed the ceilings on the number of labor hours that FEMA could order during that option period from those identified in the contract. In my mind, resolution of the first issue in FEMA's favor moots and negates the need to resolve the second issue, but the majority has decided neither.

The majority held that, because MGC had presented no factual evidence to support a negligent estimates argument, it was unnecessary to resolve whether the contract was amenable to a negligent estimates argument. The majority did not address whether FEMA effected a constructive change by exercising options using different labor hour ceilings than those identified in the contract, indicating only that options were exercised through bilateral modifications that presumably bar MGC from complaining about defects in the option exercises. In the factual circumstances of this case, I do not believe that MGC's execution of bilateral modifications bars complaints about some of those option exercises because, when MGC signed several of the modifications, FEMA was well aware that MGC was simultaneously objecting to FEMA's reduction in the labor hour ceilings under the options. The need for us to resolve the option exercise defect issue is negated only because, under the type of contract at issue here, FEMA did not guarantee that it would order anything more than the minimum quantity (if any) set forth in the contract, making (for reasons I explain below) any defect in the option exercise irrelevant. Without a finding that the contract did not provide any other guarantee, the option exercise defect issue is not moot. Accordingly, for the reasons explained below, I would resolve this appeal in the Government's favor because MGC's contract is not comparable to a requirements contract and did not obligate FEMA to order anything more than what FEMA actually ordered.

Negligent Estimates Claims Under Labor-Hour Contracts

In its summary judgment briefing, the Government argues not only that its estimates were not negligently prepared, but that the type of commercial-item labor-hour contract at issue here precludes a negligent estimates claim. The nature of this contract, the Government asserts, entitles the contractor to nothing more than what the agency in the contract actually guarantees will be ordered.

Under the United States Court of Appeals for the Federal Circuit's precedent, whether a contractor can pursue a negligent estimates claim appears heavily dependent on the type of indefinite-delivery contract at issue and the extent of the promises that the Government has made through that contract. The Federal Acquisition Regulation (FAR) states that "[t]here are three types of indefinite-delivery contracts: Definite-quantity contracts, requirements contracts, and indefinite-quantity [(IDIQ)] contracts." 48 CFR 16.501-2(a) (2018) (FAR 16.501-2(a)). Only two of those, requirements contracts and IDIQ contracts, require the Government to estimate its future needs and provide that the specific quantity of supplies or services that the Government will order will ultimately be defined by future events and circumstances. FAR 16.503(a)(1), 16.504(a)(1). It is under those two latter types of contracts that the Federal Circuit has addressed the viability of "negligent estimates" damages claims.

A requirements contract "is formed when the seller has the *exclusive* right and legal obligation to fill *all* of the buyer's needs for the goods or services described in the contract," *Modern Systems Technology Corp. v. United States*, 979 F.2d 200, 205 (Fed. Cir. 1992) (emphasis added), even though "[t]he exact requirements are usually not known." *DOT Systems, Inc.*, IBCA 1197-6-78, et al., 80-2 BCA ¶ 14,694 (quoting *Radionics, Inc.*, ASBCA 20796, 77-1 BCA ¶ 12,448), *aff'd*, 231 Ct. Cl. 765 (1982). For reasons that it explained in *Rumsfeld v. Applied Cos.*, 325 F.3d 1328 (Fed. Cir. 2003), the Federal Circuit has affirmed that negligent estimates claims can be viable under requirements contracts, holding that, if "a contractor can show by preponderant evidence that estimates were 'inadequately or negligently prepared, not in good faith, or grossly or unreasonably inadequate at the time the estimate was made'" before executing a requirements contract, the Government can be liable for damages. *Id.* at 1335 (quoting *Medart, Inc. v. Austin*, 967 F.2d 579, 581 (Fed. Cir. 1992)); *see Agility Defense & Government Services, Inc.*, 847 F.3d 1345, 1350 (Fed. Cir. 2017); *Crown Laundry & Dry Cleaners, Inc.*, ASBCA 39982, 90-3 BCA ¶ 22,993; *DOT Systems, Inc.*

The Federal Circuit has taken a different view of negligent estimates claims under IDIQ contracts. In such contracts, the Government does not promise to satisfy all of its requirements for a particular type of service or supply from the contractor but leaves open the possibility that "the Government could procure additional quantities of such supplies and

services from other sources" while guaranteeing a minimum quantity of purchases from or payment to the contractor. *DOT Systems, Inc.* (quoting *Radionics, Inc.*). The Federal Circuit has held that, as a matter of law, IDIQ contractors *cannot* maintain negligent estimates claims since the only promise that the Government makes regarding quantity in such contracts is that it will order the guaranteed minimum. *Travel Centre v. Barram*, 236 F.3d 1316, 1319-20 (Fed. Cir. 2001); *see Future Forest, LLC v. Secretary of Agriculture*, No. 2020-2039, 2021 WL 1422742, at *4-*5 (Fed. Cir. Apr. 15, 2021); *Mason v. United States*, 615 F.2d 1343, 1350 (Ct. Cl. 1980); *DOT Systems, Inc. v. United States*, 231 Ct. Cl. 765, 769 (1982). Once the Government meets its obligation to order that minimum, any "allegation that the estimates were negligently prepared, even if true, [becomes] immaterial." *C.F.S. Air Cargo, Inc.*, ASBCA 40694, 91-2 BCA ¶ 23,985; *see RocJoi Medical Imaging, LLC v. Department of Veterans Affairs*, CBCA 6885, 20-1 BCA ¶ 37,746.

If an IDIQ contract fails to identify any mandatory minimum purchase guarantee at all, the contractor *still* remains unable to seek a remedy for negligently estimated quantities because, without a minimum guarantee, the entire contract becomes illusory and unenforceable for lack of consideration and mutuality beyond the work actually performed, with payment under the terms of the contract. *Coyle's Pest Control, Inc. v. Cuomo*, 154 F.3d 1302, 1306 (Fed. Cir. 1998) (citing *Willard, Sutherland*, 262 U.S. at 493); *Mason*, 615 F.2d at 1346 n.5; *DOT Systems, Inc*., 80-2 BCA ¶ 14,694. In such circumstances, the IDIQ contractor is entitled only to retain whatever money it was paid for its prior performance under the terms of the otherwise unenforceable contract, *Coyle's Pest Control*, 154 F.3d at 1306; *Flink/Vulcan v. United States*, 63 Fed. Cl. 292, 301 (2004), *aff'd*, 163 F. App'x 890 (Fed. Cir. 2006), even if the work was performed under protest. *Federal Electric Corp. v. United States*, 486 F.2d 1377, 1381-82 (Ct. Cl. 1973). Conversely, the absence of a minimum mandatory quantity in a requirements contract does not affect that contract's enforceability because "the seller's promise to satisfy the buyer's requirements and the buyer's promise to purchase all its requirements from the seller ensure mutuality of obligation." *Mason*, 615 F.2d at 1349.

The contract at issue here is not labeled a requirements contract or an IDIQ contract but instead is identified as a labor-hour contract, which is essentially a time-and-materials contract for services without the delivery of materials. FAR 16.602. Where does a labor-hour contract fit within the context of the Federal Circuit's recent directions about the viability of "negligent estimates" claims? It is somewhat difficult to decipher.

The FAR directs that "[t]ime-and-materials contracts and labor-hour contracts are not fixed-price contracts," FAR 16.600, but does not otherwise expressly address where such contracts fit within the three kinds of indefinite-delivery contracts identified in FAR 16.501-2(a). At least one commentator has noted that neither the FAR nor statutes "yield a definitive answer to the question of how to classify time-and-materials and labor-hour

contracts." Ralph C. Nash, *Time-and-Materials and Labor-Hour Contracts: Fixed-Price or Cost Contracts?*, 12 Rep. ¶ 1 (Jan. 1998). They have been described as "indefinite-quantity, indefinite-delivery contract[s] under which payment is based on specified fixed hourly rates for labor and on a cost-reimbursable basis for materials," *Systems Research & Applications Corp.*, B-225574, et al., 87-1 CPD ¶ 540 (May 26, 1987); as "essentially . . . cost-reimbursement contract[s], where the labor provided is at a fixed hourly rate which includes overhead and profit," *Wolf, Block, Schorr & Solis-Cohen*, B-221363, et al., 86-1 CPD ¶ 491 (May 28, 1986); as fixed-price and cost-reimbursement hybrids where "the only fixed-price aspect is the burdened labor rates," Ralph C. Nash, *supra*, 12 Nash & Cibinic Rep. ¶ 1; and, on some occasions, as requirements-type contracts. *E.I.L. Instruments, Inc.*, GSBCA 4459, 76-1 BCA ¶ 11,909; *Katmai Information Technologies, LLC*, B-406885, 2012 CPD ¶ 277 (Sept. 20, 2012); *Temps & Co.*, 65 Comp. Gen. 640, 640 (June 9, 1986). According to the commentator, "[t]he coverage of time-and-materials and labor-hour contracts [in the FAR] appears to indicate that the FAR drafters did not know what to do with them." Ralph C. Nash, *supra*, 12 Nash & Cibinic Rep. ¶ 1.

A lack of consistency in classifying time-and-materials and labor-hour contracts is evident in the differing results in prior decisions analyzing negligent estimate arguments under such contracts. In *H.L. Yoh Co. v. United States*, 288 F.2d 493 (Ct. Cl. 1961), the Court of Claims permitted recovery under a time-and-materials contract when the quantity of drawings and parts lists that the contractor was asked to convert was less than what the contractor should have been provided under the contract terms. The Court described the time-and-materials contract at issue in that case as structured in a manner similar to a requirements contract, finding that the contract provided for conversion of "all drawings and parts lists at the Detroit Arsenal relating to automotive equipment." *Id.* at 494; *see New Orleans Stevedoring Co.*, ASBCA 7483, 1962 BCA ¶ 3382 (indicating that the Court in *H.L. Yoh* had considered the time-and-materials contract in that case to mirror a requirements contract). Conversely, in a recent, non-precedential small claims procedure decision in *Dream Management, Inc. v. Department of Homeland Security*, CBCA 5517, 17-1 BCA ¶ 36,716, the Board rejected the contractor's attempt to pursue a negligent estimates claim under a time-and-materials contract, holding that, even though the agency had acknowledged making a significant error in identifying estimated quantities in the solicitation and resulting contract, "[t]he concept of a negligent estimate in a time and materials contract is antithetical to the contract vehicle." In that case, the contract, though titled a time-and-materials contract, was structured in a manner that mirrored the structure of an IDIQ contract.

In my view, the fact that a contract is titled a time-and-materials contract or a labor-hour contract does not, in and of itself, define the extent to which a negligent estimates claim may be considered. "Determination of the type of contract is a matter of law – not controlled by a label in the contract." *Maintenance Engineers v. United States*, 749 F.2d 724, 726 n.3 (Fed. Cir. 1984). The FAR indicates that, in both IDIQ and requirements contracts,

the Government can adopt pricing arrangements like those that are found in time-and-materials and labor-hour contracts, FAR 16.501-2(c), and, as seen in the previously cited cases, time-and-materials and labor-hour contracts can similarly be written in a manner that makes them resemble requirements contracts or IDIQ contracts. No matter how characterized, *any* contract, to be enforceable, must provide for mutuality of obligation, *Ridge Runner Forestry v. Veneman*, 287 F.3d 1058, 1061 (Fed. Cir. 2002), and, to provide a basis for a negligent estimate claim, contain terms that make the reasonableness of the original quantity estimate relevant to a damages award. Rather than relying upon the label placed upon a contract, we must look to the contract's language and structure to determine how properly to categorize it.

Looking at MGC's contract, it does not contain terms that would make it a requirements-type contract. "[A]n essential element of a requirements contract is the promise by the buyer to purchase the subject matter of the contract *exclusively* from the seller." *Modern Systems Technology*, 979 F.2d at 205 (emphasis added). Although the contract here indicates that guard services "will be required" at no less than three particular sites identified in the contract, Exhibit 2 at 38, it does not contain any language precluding FEMA from bringing in additional resources at those sites from other sources or guaranteeing exclusivity to MGC for guard services that FEMA might ultimately need at other possible sites in Louisiana. As the Federal Circuit recognized, even if some language in a contract might "suggest exclusivity," a contract ultimately "falls short of the exclusivity language necessary for a requirements contract" where, like here, it fails to require the agency to assign all work of that type to the contractor. *Coyle's Pest Control*, 154 F.3d at 1305-06.

This particular labor-hour contract is instead set up more like an IDIQ contract for services. The manner in which services are ordered in MGC's contract mirrors the set-up of one of the IDIQ contracts in *Art Anderson Associates*, ASBCA 27807, 84-1 BCA ¶ 17,225, which identified a labor category of "Chief Design," an estimate of 650 hours, an hourly labor rate (and a parallel overtime rate), a holiday hourly labor rate, and a "Not to Exceed" amount for the contract. Because MGC's labor-hour contract is "used as the basis for pricing tasks to be specified after award," it should be "subject to the limitations imposed on [IDIQ] 'task order contracts.'" John Cibinic, Jr., Ralph C. Nash, Jr., & Christopher R. Yukins, *Formation of Government Contracts* 1323 (4th ed. 2011). Accordingly, I would apply the negligent estimate rules applicable to IDIQ contracts to the labor-hour contract at issue here.

In MGC's contract, it is questionable whether there is any minimum quantity guarantee sufficient to provide mutuality. The only possible minimum guarantee that I can see comes through the contract's representation that MGC "will be required" to provide guard services at three specific sites, albeit without specifying a minimum dollar payment or time frame for those required services. Both parties have indicated that, unlike the FAR

provisions for IDIQ contracts, the FAR provisions applicable to labor-hour contracts do not identify any requirement for a minimum quantity guarantee, *see* FAR 12.207, 16.601, 16.602, which is true, but any contract, no matter its type, has to create mutuality to be enforceable, *Ridge Runner Forestry*, 287 F.3d at 1061, and neither party has identified how, absent a minimum quantity obligation, that mutuality would be established in this non-requirements contract. Nevertheless, the mutuality issue need not be resolved because, regardless of its outcome, MGC's negligent estimates claim is not viable as a matter of law. If the contract here is unenforceable for lack of mutuality, MGC is not entitled to prevail on its negligent estimates claim, as its recovery is limited to what it has already been paid. *See Coyle's Pest Control*, 154 F.3d at 1305-06; *Flink/Vulcan*, 63 Fed. Cl. at 301. If the contract is enforceable, MGC cannot succeed on a negligent estimate claim for the same reasons that such claims are not viable under IDIQ contracts. *See Travel Centre*, 236 F.3d at 1319-20. I would find that DHS is entitled to summary judgment on MGC's inability to maintain a negligent estimate argument.

Why We Must Resolve The Agency's Negligent Estimates Argument

A constructive change issue in this appeal related to the one addressed by the majority involves potential defects in FEMA's option exercises. If the labor-hour contract at issue here were written in a manner that entitled MGC to something more than a minimum labor-hour guarantee, we would have to decide that issue. Only because MGC's contract provides no such right is that constructive change issue moot.

When FEMA exercised each of the first seven options under this contract, it did not identify the 15,120 labor hours estimate set forth in the contract for each option period. Instead, it modified the labor hours number to reflect what it then thought it actually would order during that period – in the first option exercise, it increased the labor hours estimate above the 15,120 figure, but, in every other exercise, it reduced (sometimes significantly) the estimate below the 15,120 figure. Given that the labor hours estimate in a labor-hour contract creates a ceiling on the number of labor hours that the agency can order and the contractor can perform during the relevant period, FAR 12.207(b)(1)(ii)(B), FEMA's exercise of options using a modified ceiling begs the question of whether the exercises were valid.

It is a general rule that, if the Government "attempts to alter the conditions of the contractor's obligation" when it exercises an option, "the purported option exercise normally becomes ineffective" and entitles the contractor "to an equitable adjustment for a constructive contract change under the Changes clause." *Safeguard Maintenance Corp.*, IBCA 3379-E, 95-1 BCA ¶ 27,383 (1994). Did FEMA change the terms of the option when it purported to exercise them in a manner that could constitute a constructive change?

In its decision, the majority references the fact that FEMA exercised the options through bilateral modifications. Given that such a modification can create a "substituted contract" that discharges any complaint about the nature of the Government's action, *Kokosing Construction Co.*, EBCA 439-2-90, 91-1 BCA ¶ 23,508 (1990), the bilateral nature of the modifications might be viewed as rendering any concern about the manner of the option exercises irrelevant. Nevertheless, whether a "substituted contract" results from a bilateral modification depends upon the intention of the parties. *Transworld Systems Inc. v. Department of Education*, CBCA 6049 (Aug. 13, 2020). Because MGC executed bilateral modifications accepting the first three option exercises without comment or complaint, it most likely has no basis upon which to object to them. Nevertheless, before executing the modification exercising the fourth option, MGC not only complained to the contracting officer about the constant reduction in labor hours but submitted an REA seeking an equitable adjustment as a result of what it called a constructive change. FEMA was well aware of MGC's complaints when executing modifications regarding the fourth, fifth, and sixth option periods, and FEMA exercised the seventh option through a unilateral, not bilateral, modification. In such circumstances, I cannot see how the mere fact that MGC signed bilateral modifications involving options necessarily bars objections to them, either in form or content. *See Daniels Co. of Southern Pines*, ASBCA 18920, 74-1 BCA ¶ 10,608 (contracting officer's knowledge at time of bilateral modification execution that contractor did not consider it a resolution of the contractor's dispute precluded accord and satisfaction).

Nevertheless, if, under the terms of its contract, FEMA had no obligation to order anything more than the minimum number of labor hours guaranteed by the contract, or if the contract was illusory because it provided no minimum guarantee at all and was not a requirements contract, MGC could not, for reasons that I discussed above, seek damages for negligent estimates or for any quantity of missed labor hours beyond the minimum guarantee. Its only right under a contract guaranteeing purchase of a minimum number of labor hours is payment for that minimum. *Future Forest*, 2021 WL 1422742, at *4-*5; *Travel Centre*, 236 F.3d at 1319-20. Its remedy under an illusory contract is to retain whatever money it was paid for its prior performance under the terms of the otherwise unenforceable contract. *Coyle's Pest Control*, 154 F.3d at 1306. In either circumstance, any defect in the exercise of option periods would provide no basis for an increased monetary recovery.

Because of my view of the nature of MGC's contract, I do not believe it necessary to resolve any questions about the validity of FEMA's option exercises. Nevertheless, I believe that, to come to the conclusion that an invalid option exercise would not provide MGC with any monetary rights for a constructive change, the Board must first identify the nature of the contract and decide the extent to which the contractor may maintain a negligent estimates claim under it. I concur in the result that the majority reached in this appeal, but I disagree with its belief that a decision about the nature of and rights created by the underlying contract is unnecessary to reach that result.

For the foregoing reasons, I concur in the decision to deny MGC's appeal.

*Harold D. Lester, Jr.*
HAROLD D. LESTER, JR.
Board Judge