UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

DENIED: March 10, 2023

CBCA 7492

JOHN DOUGLAS BURKE,

Appellant,

v.

DEPARTMENT OF HEALTH AND HUMAN SERVICES,

Respondent.

John Douglas Burke, pro se, Rockville, MD.

Pamela R. Waldron and Ethan Chae, Office of the General Counsel, Department of Health and Human Services, Washington, DC, counsel for Respondent.

Before Board Judges **BEARDSLEY** (Chair), **LESTER**, and **O'ROURKE**.

LESTER, Board Judge.

Appellant, John Douglas Burke, provided what were contractually described as "professional services" under a series of purchase orders with the National Institutes of Health (NIH). After the last of those purchase orders expired, Mr. Burke submitted a certified claim under the Contract Disputes Act (CDA), 41 U.S.C. §§ 7101–7109 (2018), asserting that, while working under his purchase orders, he was effectively serving as a federal civil service employee and that, rather than the hourly rates at which he was compensated under his contracts, he was entitled to receive the salary and benefits of a federal civil service employee. After the contracting officer denied his claim, Mr. Burke appealed to the Board. NIH has filed a motion to dismiss Mr. Burke's appeal for failure to state a claim on which relief can be granted, arguing that he was paid the full amounts to

which he agreed in his purchase orders and is entitled to nothing more now that his service under those agreements is complete.

Mr. Burke's arguments mirror those that the United States Court of Appeals for the Federal Circuit considered and rejected in *Lee v. United States*, 895 F.3d 1363 (Fed. Cir. 2018). The essence of Mr. Burke's complaint is that his purchase orders were illegal personal services contracts, in violation of Federal Acquisition Regulation (FAR) 37.104 (48 CFR 37.104 (2021)), and that, because of the illegality, he should effectively be treated as a federal employee for the purposes of pay and benefits. Mr. Burke has informed us that, in developing his claim and his arguments, he used the *Lee* decision as a framework for his own case. He argues that, although the *Lee* plaintiffs were unsuccessful, the facts of his case are more compelling than what the Federal Circuit considered in *Lee* and that he is entitled to the relief that he seeks.

The Federal Circuit's decision in *Lee* controls our resolution of this matter. Although Mr. Burke's contracts contain somewhat different language and less precise terms than the contracts that the Federal Circuit considered in *Lee*, and although there is some disagreement between the parties as to the extent to which particular documents are incorporated into the purchase orders, the Federal Circuit's guidance in *Lee* precludes Mr. Burke from prevailing on his claim here. Assuming the truth of his allegations about the terms of his contracts, Mr. Burke has not presented a viable basis for invalidating or reforming his past purchase orders. As a result, we grant NIH's motion to dismiss this appeal for failure to state a claim and deny Mr. Burke's appeal.

Factual Allegations

The facts identified below are based upon the allegations that Mr. Burke made in his amended complaint, which mirror and add to the allegations contained in his certified claim and notice of appeal; documents that the parties agree are part of the purchase orders underlying this appeal; price quotes that Mr. Burke cites in his notice of appeal; and, for informational purposes only, some limited additional evidence contained in the record.

Mr. Burke's First Purchase Order for Professional Services

Mr. Burke asserts that he originally began working for the Section on Human Biochemical Genetics of NIH's National Human Genome Research Institute (NHGRI) under the series of purchase orders at issue here in approximately September 2014.[1] The earliest

[1] Mr. Burke indicates that, before September 2014, he worked for several years as a contractor under similar contracts for a different laboratory of NHGRI.

purchase order in the record, however, is dated July 20, 2015. That 2015 purchase order was written on Optional Form 137 (rev. 02/12) (OF-137), "Order for Supplies or Services," which is prescribed by FAR 53.213(f) (48 CFR 53.213(f) (2014)). That two-page OF-137 identified Mr. Burke as the contractor and NHGRI as the administrative office for the order. In the "Supplies/Services" column of the order, it stated as follows:

> Professional services contract for John Doug Burke – Catalog #: None
> Delivery To: 10C107/Carla Carla
> Product/Service Code: R499
> Product/Service Description: SUPPORT-PROFESSIONAL: OTHER

Appeal File, Exhibit 1 at 2.[2] The identified quantity in the order was 200 hours, at a specific unit price per hour, but there is nothing in the two-page OF-137 itself that defines exactly what work Mr. Burke was supposed to perform under the purchase order (beyond the words, "Support-Professional: Other"). Although the purchase order is dated July 20, 2015, the OF-137 does not identify a specific start or end date for performance under the purchase order. Further, the OF-137 does not reference or purport to incorporate any clauses from the FAR, nor does it reference or purport to incorporate any other documents.

Even though the OF-137 itself does not expressly identify the specific work that he was to perform, Mr. Burke alleges that he agreed through the purchase order to produce research animal models for NHGRI (essentially running the laboratory's research animal program), with the goal of assisting in efforts to develop a gene therapy for Hermansky-Pudlak Syndrome (HPS1). Mr. Burke alleges that the purchase order was based on and incorporated a price quote that he had previously provided to NHGRI. He asserts that, in the quote, he included an hourly rate, which NIH then incorporated into the purchase order, and that he was to invoice NHGRI for the number of hours that he worked.

Mr. Burke alleges that, despite the absence of language identifying what work he was to perform or the dates of performance, the two-page OF-137 constitutes the entirety of his first contract with NIH. NIH disagrees and has included documents in the appeal file that it believes should be viewed as a part of and incorporated into the parties' contract. A statement of work (SOW) for the purchase order identifies a performance period of August 1, 2015, to July 31, 2016, which was later extended by modification to September 30, 2017. In the SOW, NIH stated, consistent with Mr. Burke's allegations, that the purchase order was intended to support a project to develop gene therapy for HPS1 using a lentiviral vector to deliver HPS1 copy deoxyribonucleic acid (cDNA) to the lung intravenously and/or by aerosol. Exhibit 1A at 3. As set forth in the SOW, NIH needed assistance in developing a

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[2] All exhibits are found in the appeal file, unless otherwise noted.

robust mouse model of HPS1 using a new technology for that project. The purchase order awardee was expected to "[b]uild a lentiviral vector able to deliver the HPS1 cDNA in vitro to HPS1 deficient cells and in vivo to HPS1 deficient mice"; "[c]reate a mouse model of HPS1 using the" new technology; "[c]onduct a literature search, develop a suitable protocol, acquire reagents, and demonstrate proficiency with [a particular] assay with control mouse lung"; "[g]row mouse wild type (melan A) and HPS1 (melan ep) cell lines"; "[t]ransduce the cells with the lentiviral HPS1 vector;" and "[d]emonstrate the presence of HPS1 and HPS4 proteins in extracts of transduced HPS1 cells by Western blot." *Id.* The SOW listed the following tasks that the contractor would be expected to undertake:

> – Perform molecular and cell biology tasks following NIH laboratory safety procedures and policies[.]
> – Maintain in vitro cultures of mouse wild-type and HPS1 deficient cells.
> – Maintain in vitro cultures of human healthy control and human patient-derived melanocyte cells.
> – Work in close collaboration with the NHGRI Mouse Transgenic Core to assure efficient transfer of constructs and creation of the HPS1 knockout mouse and maintenance of the project timelines[.]
> – Handling of HPS1 knockout mouse model as source of experimental cells and tissues and as recipient of gene transfer lentiviral vectors.

Id. at 4. It identified the Government's responsibilities as follows:

> – The Government will furnish the reagents and laboratory space and instruments for the proper conduction of the studies.
> – The Government will review and approve the design of the experiments and the resulting data.

Id. As for "Reporting Requirements and Deliverables," the SOW indicated a requirement for "[w]eekly informal updates on the progress of the study and monthly detailed presentations." *Id.* The "Inspector and Acceptance Requirements" were that "[f]ormal inspection and acceptance of the results [would] occur at monthly meetings during which the contractor will present progress report, emerging data and future plans." *Id.* at 5. The "Program Management and Control Requirements" were identified as "None." *Id.* Like the two-page OF-137, the SOW identified no FAR clauses.

NIH has also provided the Board with a copy of a document titled "Statement of Need" (SON) that it asserts is also a part of the purchase order. In it, NIH explains Mr. Burke's background and his prior work with the technology that NIH wanted to develop, and it indicated that, based upon his experience, "[h]e is the natural choice to work on the development of a new HPS1 mouse model using" the new technology. Exhibit 1B at 6.

"Securing his services," it says, "will avoid the need of training new personnel in these areas and will therefore increase the efficiency with which this project will be carried out." *Id.* NIH also believes that a sole source justification and a document titled "List of Duties" are part of and incorporated into the purchase order.

Mr. Burke represents that he never saw the SOW, the SON, the sole source justification, or the "List of Duties" (or at least never saw most of them) before the documents were submitted to the Board as part of the Rule 4 appeal file. He contests the idea that the documents are a part of the purchase order that he was issued.

The Follow-On Purchase Orders

Mr. Burke alleges that, after the initial purchase order expired, NIH issued a series of follow-on purchase orders, all on OF-137s, that ultimately extended Mr. Burke's work with NIH (at increased hourly rates) through September 30, 2021. In the purchase orders issued in August 2020 and later, NIH changed the "Product/Service Description" from "Support-Professional: Other" to "Support-Professional: Program Management/Support" and the "Product/Service Code" from "R499" to "R408."[3] Exhibits 13A at 237, 14A at 227, 15A at 295. Mr. Burke alleges that each of NIH's purchase orders was based on and incorporated a price quote that he had previously provided to NHGRI, which, from at least 2017 onward, described the work that he was to perform as "[t]asks related to the generation and characterization of multiple mouse models of monogenic diseases" or something similar. Exhibits 5–15. In each quote, he included an hourly rate, which he asserts NIH then incorporated into an executed purchase order, and he would invoice NHGRI for the number of hours that he worked. None of those two-page orders referenced or purported to incorporate any FAR clauses or other documents, although most identify a period of performance.

[3] The General Services Administration's Federal Procurement Data System Product and Service Codes (PSC) Manual (Fiscal Year 2022 ed. Apr. 2022), available at https://www.acquisition.gov/sites/default/files/manual/PSC%20Manual%20April%202022.pdf (last visited March 7, 2023), provides that the "R408" code applies to "Situations Where The Contractor Is Solely Responsible for Program Management As Well As Situations Where The Contractor Provides Program Management Support to A Government Program Manager," while the "R499" code is more of a miscellaneous professional services catchall. *Id.* at 59-60. The Manual states that "[t]hese codes indicate 'WHAT' was bought for each contract action reported in the Federal Procurement Data System." *Id.* at 4. For any given contract action, the code is "selected based on the predominant product or service that is being purchased." *Id.* at 4, 7.

Even though the purchase orders themselves do not expressly identify the specific work that he was to perform, Mr. Burke, again consistent with the statements in the SON, alleges that he agreed through the orders to produce research animal models (essentially running the contracting laboratory's research animal program), with the goal of assisting in efforts to develop a treatment for HPS1. He alleges, however, that he also assisted on other projects that were not quoted and were not specifically covered by his purchase orders — specifically, conducting additional gene therapy research, providing training for students and new arrivals, and assisting with laboratory emergencies and general laboratory upkeep.

He alleges that, throughout his time with NHGRI, the NIH employee directory listed him as a "Contractor" but that he was, in reality, effectively working as a "laboratory technician." He further alleges that he was the only bench scientist in his laboratory hired under a purchase order. All other bench scientists of comparable seniority in his lab, he asserts, were GS-level NIH employees or employees of other agencies with approximate pay and benefit parity with NIH's federal employees.

NIH's last purchase order with Mr. Burke expired on September 30, 2021. Mr. Burke says that, before the purchase order expired, he had been informed that his projects would be discontinued and that his services would no longer be needed after that date. He alleges on information and belief that the real reason for the decision not to award him another purchase order was because he had, four weeks earlier, complained to the NIH Office of the Ombudsman about what he describes as "a COVID return-to-work matter."

Mr. Burke's Certified Claim

On June 6, 2022, Mr. Burke submitted a certified CDA claim to the NIH contracting officer seeking payment of $414,493, which he represented was the difference between what he was actually paid for his work in the years 2018 through 2021 and what he believes he was entitled to be paid.[4] He explained the basis of his claim as follows:

> I am filing this claim contending that I was misclassified as an independent contractor when the economic reality was that I functioned as an employee and should therefore have been classified as the latter. I further contend that NIH breached its contractual obligation by requiring me to provide personal services outside the terms of the contract/quotation and failed to compensate me as a provider of such working in the manner of federal employees.

[4] Although Mr. Burke began working for NIH under purchase orders in 2014, he has limited his monetary claim to work performed between 2018 and 2021.

Notice of Appeal, Document B at 2. He then listed the reasons for his belief that he is entitled to federal civil service employee pay, which include, among others, the following:

> (1) He "performed all of [his] work personally on the NIH main campus," with "[a]ll of the resources and tools of [his] work . . . provided by NIH," "an assigned desk and laboratory bench, an NIH email account, ID, and parking permit," and almost all work having to be conducted on-site, *id.*;
> (2) His affiliation and address in research publications was identified as the NHGRI campus in Bethesda, Maryland;
> (3) He was working full-time for and was entirely dependent on NHGRI financially;
> (4) He was required to work specific (often reduced) shifts during the COVID-19 pandemic and, during lockdown, was given a special exception as essential staff to report to work to ensure continuity of operations (specifically, to ensure care for the animals);
> (5) He was not infrequently required to report on weekends and holidays to respond to animal emergencies;
> (6) He was heavily integrated into the culture and operation of the laboratory, and others depended on him for their own projects;
> (7) He received several purchase orders over the course of seven years, "establishing a de facto permanence and certainly a continuing relationship with the lab," *id.*; and
> (8) He had no investment in the NIH facilities at which he worked.

Mr. Burke argued in his claim that, by being classified as an independent contractor rather than a federal employee, he was "grossly underpaid and received no fringe benefits through [his] time with NHGRI." Notice of Appeal, Document B at 2-3. He asserted that, "[a]s a provider of personal services to NHGRI . . . and therefore an employee of the agency, [he] was entitled to the prevailing wage and benefits received by traditional federal employees of the National Capital Area." *Id.* at 3. He also stated that the provisions within his purchase orders were "so minimal," notably not referencing any FAR provisions, "as to render the contracts void or voidable" and that, without an enforceable express contract, he should be allowed to recover the pay difference under an implied-in-fact contract to preclude unjust enrichment by the agency. *Id.* He then requested the following relief:

> [C]onsistent with the provisions and requirements of the Fair Labor Standards Act, the Service Contract Act, the Back Pay Act, the [CDA], and the F.A.R., I seek back pay and/or contractual adjustments [of $414,493] for the most recent 3-4 years of my work [2018, 2019, 2020, and 2021] in NHGRI, compensation for lost benefits, retroactive appointment as a federal employee

> (competitive or excepted service), [and] student loan repayment adjustments for public service.

Id. at 4.

The Contracting Officer's Decision

By decision dated September 1, 2022, the NIH contracting officer denied Mr. Burke's claim. In her decision, the contracting officer noted that Mr. Burke has an active registration in SAM.gov pursuant to FAR 4.11 under which he is registered as a sole proprietorship. She indicated that the entirety of the parties' relationship had been contractual and that NIH had paid all invoices that Mr. Burke had submitted under the purchase orders. As a result, she determined that "the evidence demonstrated that you were fully compensated pursuant to the contracts for the services you provided during the period of performance." Notice of Appeal, Document C at 2. She also noted that "[n]o terms or languages in the contracts guaranteed or required your appointment as a federal employee based on the services you provided under your contracts." *Id.* She further represented that, to the extent that Mr. Burke alleged having performed work beyond the terms of his purchase orders, "you have not identified the specific personal services outside of the terms of your contract nor offered any evidence that you performed those services." *Id.* Accordingly, she denied Mr. Burke's claim.

Mr. Burke's Appeal to the Board

On September 5, 2022, Mr. Burke filed a notice of appeal with the Board. Attached to his notice of appeal were copies of his claim, the contracting officer's final decision, and purchase orders dated February 25 and August 23, 2021. On September 19, 2022, Mr. Burke designated his claim as his complaint in this appeal, and NIH subsequently filed the Rule 4 appeal file containing additional purchase orders with Mr. Burke dating back to 2015. As NIH was preparing to file a motion to dismiss this appeal for failure to state a claim in lieu of an answer, Mr. Burke requested leave to file a not-yet-prepared amended complaint, albeit without any explanation of the reason for the amendment. The Board directed NIH to proceed with filing its motion to dismiss, which it did on November 4, 2022, but informed Mr. Burke that he could decide whether to file an amended complaint after reviewing the motion. Mr. Burke filed his amended complaint on December 15, 2022, and his response to NIH's motion on December 16, 2022. NIH responded to the amended complaint on January 6, 2023, arguing that it did not affect the validity of its motion to dismiss.

Subsequently, on February 22, 2023, each party (at the Board's request) filed supplemental briefs addressing their positions on what documents comprised each relevant purchase order; the extent to which Mr. Burke's purchase orders should, or should not, be viewed as personal services contracts; and the effect of the Federal Circuit's decision in *Lee*

v. United States, 895 F.3d 1363 (Fed. Cir. 2018), on the issues in this appeal. Accompanying NIH's supplemental brief was a declaration from an NIH staff scientist and several other documents that were not a part of the notice of appeal or complaint.

Discussion

I. Standard of Review

Pursuant to Board Rule 8(e) (48 CFR 6101.8(e) (2021)), "[a] party may move to dismiss all or part of a claim for failure to state grounds on which the Board could grant relief." "The [tribunal's] task in considering a motion to dismiss for failure to state a claim is not to determine whether [an appellant] will ultimately prevail, but 'whether the claimant is entitled to offer evidence to support the claims.'" *Integhearty Wheelchair Van Services, LLC v. Department of Veterans Affairs*, CBCA 7318, 22-1 BCA ¶ 38,156, at 185,311 (quoting *J. Cardenas & Sons Farming, Inc. v. United States*, 88 Fed. Cl. 153, 160-61 (2003) (quoting *Chapman Law Firm Co. v. Greenleaf Construction Co.*, 490 F.3d 934, 938 (Fed. Cir. 2007))). In deciding such motions, the Board looks for guidance to Rule 12(b)(6) of the Federal Rules of Civil Procedure. Board Rule 8(e).

To survive such a motion, the appellant's complaint must "contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). Because Mr. Burke's certified claim, which Mr. Burke attached to his notice of appeal in accordance with Board Rule 2(a), provides the jurisdictional basis for our review under the CDA, we can look to the allegations contained therein, along with those in Mr. Burke's amended complaint, in considering the Government's dispositive motion. *Fluor Intercontinental, Inc.*, ASBCA 62550,et al., 22-1 BCA ¶ 38,105, at 185,096. "A claim has facial plausibility when the [appellant] pleads factual content that allows the [tribunal] to draw the reasonable inference that the [respondent] is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678.

II. The Relevant Contract Terms

In evaluating a motion to dismiss for failure to state a claim, "we are 'not limited to the four corners'" of the claim and the complaint and "may also look to 'matters incorporated by reference or integral to the claim, items subject to judicial notice, [and] matters of public record.'" *Dimare Fresh, Inc. v. United States*, 808 F.3d 1301, 1306 (Fed. Cir. 2015) (quoting 5B Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 1357 (3d ed. 2004)). Typically, the terms of a contract are considered integral to a claim arising under it, meaning that the Board may look to the contract in evaluating a motion to dismiss. *Systems Management and Research Technologies Corp. v. Department of Energy*, CBCA 4068, 15-1

BCA ¶ 35,976, at 175,789. Before looking to integral documents, however, "it must be clear on the record that no dispute exists regarding the authenticity or accuracy of the document." *Faulkner v. Beer*, 463 F.3d 130, 134 (2d Cir. 2006).

Here, although the parties agree that each two-page OF-137 that NIH issued to Mr. Burke is a part of a purchase order relevant to his claim, they disagree on whether additional documents — the SOW, the SON, a "List of Duties," and a sole-source justification — are incorporated into and should be considered a part of each purchase order. Mr. Burke asserts that, before NIH submitted the Rule 4 appeal file in this case, he had never seen most of those documents. Although it seems odd that none of Mr. Burke's purchase orders contain any FAR clauses, nowhere in the OF-137 purchase orders is there any reference to other documents or to the incorporation of other documents. Without looking to additional evidence, which we cannot do when considering a motion to dismiss for failure to state a claim, Fed. R. Civ. P. 12(b)(6), we cannot resolve what documents, beyond the two-page OF-137, are a part of each NIH purchase order.

That does not preclude us from reviewing NIH's motion. For purposes of identifying what Mr. Burke's contracts said, we refer to Mr. Burke's allegations about their terms, coupled with the two-page OF-137s in the record to which he refers. Further, the quotes for the 2018 to 2021 purchase orders being challenged in this appeal, which are in the record, are referenced in Mr. Burke's notice of appeal. Those quotes tell us that the work that Mr. Burke was agreeing to provide involved "[t]asks related to the generation and characterization of multiple mouse models of monogenic diseases." Exhibits 5–15. That definition is consistent with Mr. Burke's allegations about what work he had agreed to undertake through the purchase orders. Mr. Burke also alleges that other projects on which he assisted — specifically, conducting additional gene therapy research, providing training for students and new arrivals, and assisting with laboratory emergencies and general laboratory upkeep — were not covered by the terms of his purchase orders. We assume those factual allegations as true for purposes of evaluating NIH's motion except to the extent that they conflict with the OF-137s and price quotes identified above.[5]

[5] For purposes of evaluating NIH's motion, we will not consider the evidence that NIH presented as attachments to a supplemental brief: a declaration from a NHGRI staff scientist responding to various factual allegations contained in Mr. Burke's amended complaint, a return-to-work email, and a COVID-19 safety plan. *See Integhearty Wheelchair*, 22-1 BCA at 185,312 ("In considering a motion to dismiss for failure to state a claim, we do not consider evidence outside the complaint.").

III. Mr. Burke's Challenges To His Express Contract

A. Whether Mr. Burke Waived Objections To The Original Contract Terms

In neither his claim nor his amended complaint does Mr. Burke really seem to allege a breach of the express terms, as written, of his purchase orders. He acknowledges that, for each purchase order that he accepted, he had previously provided NIH with a quote identifying a proposed hourly rate, that NIH had adopted the rate in that quote and inserted it into the purchase order, that he regularly invoiced NIH for work performed in accordance with that rate, and that NIH paid him at that rate. On its face, there is no basis for arguing that NIH did not pay him in accordance with the express terms of the purchase orders under which he was working. He agreed to do the work for the amounts that he was paid.

Instead, Mr. Burke challenges the validity of the purchase orders' express terms themselves, arguing that they are invalid. His main challenge is that he "was misclassified as an independent contractor when the economic reality was that [he] functioned as [a federal] employee and should therefore have been classified as the latter." Notice of Appeal, Document B at 2.[6] As noted above, he tells us that, in drafting his amended complaint, he borrowed heavily from the Federal Circuit's decision in *Lee*, in which the plaintiffs had complained that the manner in which they had been required to perform services contracts into which they had entered extended them beyond the bounds of their written contracts and rose to the level of illegal personal services contracts, in violation of the FAR. *See* Appellant's Response to the Board's February 8, 2023, Order (Feb. 22, 2023) at 1. Mr. Burke argues that the illegality of his contracts voids them and entitles him to the same pay and benefits that federal employees would have received for the personal services that he performed.

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[6] In his original notice of appeal, Mr. Burke asked that, as a remedy for NIH's contract breaches, the Board designate him as an employee of the federal civil service. Although Mr. Burke informed us in a supplemental brief that he was withdrawing that request and was now only asking for the same pay and benefits as a federal employee, we note that "[i]t is well established that an appointment is necessary for a person to hold a government position and be entitled to its benefits" and "that '[a]n abundance of federal function and supervision will not make up for the lack of an appointment.'" *Horner v. Acosta*, 803 F.2d 687, 692-93 (Fed. Cir. 1986) (quoting *Costner v. United States*, 665 F.2d 1016, 1020 (Ct. Cl. 1981)); *see* 5 U.S.C. § 2105(a) (2018). We lack authority to make such an appointment.

Normally, if a contractor is aware of a defect in a contract's terms prior to award but says nothing to the Government about it, he cannot raise that defect for the first time after performance is complete and expect to increase his contract price. *See S.O.G. of Arkansas v. United States*, 546 F.2d 367, 371 (Ct. Cl. 1976) ("[A] bidder, who knows (or should know) of a serious problem in [the contract], . . . [cannot] consciously tak[e] the award with a lower bid . . . with the expectation that he will then be able to cry 'change' or 'extra'" after performing.); *Beacon Construction Co. of Massachusetts v. United States*, 314 F.2d 501, 504 (Ct. Cl. 1963) ("[W]hen [an offeror] is presented with an obvious omission, inconsistency, or discrepancy of significance, he must consult the Government's representatives [before award] if he intends to bridge the crevasse in his own favor."). The rule regarding pre-award inquiries about defects in the terms of a contract "prevents contractors from taking advantage of the Government; it protects other bidders by ensuring that all bidders bid on the same specifications; and it materially aids the administration of Government contracts by requiring that ambiguities [or other known defects] be raised before the contract is bid on, thus avoiding costly litigation after the fact." *Newsom v. United States*, 676 F.2d 647, 649 (Ct. Cl. 1982).

In this case, Mr. Burke is attempting to eliminate from his written purchase orders the hourly rates contained therein — rates that he himself proposed — and replace them with higher rates equivalent to what a federal civil service employee would make. That would render the pricing terms in his purchase orders meaningless as well as ineffective, in violation of standard contract interpretation principles. *Phoenix Management, Inc. v. General Services Administration*, CBCA 7091, 22-1 BCA ¶ 37,977, at 184,442 (2021). Certainly, Mr. Burke knew or should have known, prior to award of his purchase orders, the nature of the work that he would be performing.[7] If he thought his hourly rates were too low, he should have proposed and insisted upon higher rates before agreeing to the purchase orders. He cannot, after performance is complete, renegotiate his compensation levels based on defects of which he should have been aware before accepting these purchase orders.

There is an exception to this pre-performance protest requirement, and Mr. Burke relies on that exception here. "[I]f government officials make a contract they are not authorized to make, in violation of a law enacted for the contractor's protection, the contractor is not bound by estoppel, acquiescence or failure to protest" and may seek reformation of the contract even if the contractor failed to identify the defect prior to

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[7] According to Mr. Burke, he had been performing his work under purchase orders for three years – from 2014 to 2017 – before the period of time (2018 to 2021) for which he is currently seeking compensation. Even if he was unaware of his current pay issue when he started work under the first order in 2014, he certainly should have been aware of it as he continued accepting purchase orders for work from 2018 through 2021.

performance. *LaBarge Products, Inc. v. West*, 46 F.3d 1547, 1552 (Fed. Cir. 1995). As Mr. Burke correctly notes, and as the Federal Circuit recognized in *Lee*, agencies are prohibited by regulation from awarding personal services contracts unless specifically authorized by statute. *Lee*, 895 F.3d at 1370-71 (citing FAR 37.104). NIH cites no statute that would have allowed it to award a personal services contract to Mr. Burke.

Mr. Burke argues that his purchase orders were in effect illegal personal services contracts and that, as a result, his failure to protest is irrelevant to his right to recover. Below, following the guidance of the *Lee* Court's analysis, we first address whether Mr. Burke's contract constitutes a "personal services" contract and then address whether, if it does, it rises to the level of illegality that would void it.

B. Whether Mr. Burke's Contracts Are For Personal Services

"A personal services contract is characterized by the employer-employee relationship it creates between the government and the contractor's personnel." *W.B. Jolley*, B-234146, 89-1 CPD ¶ 339 (Mar. 31, 1989). Pursuant to the FAR, "an employer-employee relationship under a service contract occurs when, as a result of the contract's terms or 'the manner of its administration during performance, contractor personnel are subject to the relatively continuous supervision and control of a Government officer or employee.'" *Lee*, 895 F.3d at 1370 (quoting FAR 37.104(c)(1)). The FAR identifies the following "descriptive elements" that "should be used as a guide in assessing whether . . . [a] contract is personal in nature," including that "[p]erformance [is] on site"; that "[p]rincipal tools and equipment [are] furnished by the Government"; that "[s]ervices are applied directly to the integral effort of agencies or an organizational subpart in furtherance of its assigned function or mission"; that "[c]omparable services, meeting comparable needs, are performed in the same or similar agencies using civil service personnel"; that "[t]he need for the type of service provided can reasonably be expected to last beyond one year"; and that "[t]he inherent nature of the service, or the manner in which it is provided reasonably requires directly or indirectly, Government direction or supervision of contractor employees." FAR 37.104(d).

"While the FAR enumerates various factors to be considered in making this judgment, . . . it provides that the 'key question' in determining whether a contract is for personal services is: 'Will the government exercise relatively continuous supervision and control over contractor personnel performing the contract.'" *W.B. Jolley* (quoting FAR 37.104(c)(2)); *see Lee*, 895 F.3d at 1371 ("[T]he principal ground on which a contract will be found to be personal services contract . . . is the degree of supervision to which the contracting employees were subject under the contract."); *Logistical Support, Inc.*, B-197488, 80-2 CPD ¶ 391 (Nov. 24, 1980) ("[F]or such a situation to occur, the solicitation must provide for detailed Government direction or supervision of the contractor's employees."). The presence of factors listed in the FAR, such as performance on site and the use of principal tools and

equipment furnished by the Government, do not "per se render[] the contract a personal services contract" but instead are merely "to be used as indicia of continuous supervision and control of contractor personnel by the government." *W.B. Jolley*. Further, the mere fact that a contract is awarded to an individual (or sole proprietorship) who will be performing the contract work, rather than to a larger business with a more corporate-like structure with managers assigning other employees to work on the contract, does not necessarily mean that the contract is one for personal services. *Monarch Enterprises, Inc.*, B-233303, et al., 89-1 CPD ¶ 222 (Mar. 2, 1989). Ultimately, "[e]ach contract arrangement must be judged in the light of its own facts and circumstances." FAR 37.104(c)(2). If, in the final analysis, the contract does not "provide for detailed government direction or supervision of the contractor's employees," it is not a personal services contract. *McGregor FSC, Inc.*, B-224634, 86-2 CPD ¶ 537 (Nov. 7, 1986).

In evaluating allegations that a contract was one for personal services, the Federal Circuit in *Lee* looked to the actual written terms of the contract in question, requiring the plaintiffs "to show that the . . . contracts, *by their terms*, provided for direct government supervision to a degree that rendered them personal services contracts that were invalid under FAR § 37.104." *Lee*, 895 F.3d at 1371 (emphasis added). Where "[t]he contracts . . . did not by their terms provide for close government supervision of the [contractors]," the Federal Circuit found that they would not be contracts for personal services. *Id.* Mr. Burke's purchase orders, as he describes them, differ somewhat from the contracts at issue in *Lee*, where the contracts expressly provided that the contractors were "responsible for their own management and administration" and would be "free from supervision or control by any Government employee." *Id.* Mr. Burke's purchase orders, as far as we know, contain no such language. Nevertheless, most of the purchase orders under which Mr. Burke is seeking damages[8] reference a Federal Procurement Data System PSC, "R408," that only applies to "Situations Where The Contractor Is Solely Responsible for Program Management As Well As Situations Where The Contractor Provides Program Management Support to A Government Program Manager," suggesting a level of independence inconsistent with strict government direction and oversight. *See, e.g.*, Exhibits 13A, 14A, 15A. Under his contracts, Mr. Burke was to perform "[t]asks related to the generation and characterization of multiple mouse models of monogenic diseases," Exhibit 5, without any further language establishing government supervision requirements. In any event, none of Mr. Burke's allegations about his purchase orders suggests that, as a term of the contracts, he was contractually subject to the level of direct government supervision that the court in *Lee* indicated would be necessary to create a personal services contract.

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[8] As previously noted, Mr. Burke has limited his damages claims to work performed from 2018 to 2021.

Mr. Burke alleges that his contract work conditions satisfy several of the items listed in FAR 37.104(d), supporting his characterization of his contracts as being for personal services: he was working at the NIH site; although listed as a contractor in NIH directories, his address was identified in research publications as the NHGRI campus in Bethesda, Maryland; his principal tools and equipment were furnished by the Government; his services were integral to NHGRI's effort to develop an HPS1 gene therapy; he had to attend regular meetings with NHGRI employees to report on his work; his work far exceeded the one-year period identified in FAR 37.104(d); and he was fully integrated into and worked with NHGRI staff. None of those allegations, though, indicate direct government control and supervision of the work that he was performing. In rejecting an argument by the plaintiffs in *Lee* about the FAR 37.104(d) factors that mirrors Mr. Burke's, the Federal Circuit held that the factors "are far from definitive"[9] and are not, in and of themselves, enough to convert a contract into one for personal services *absent* a clear contractual requirement for direct government supervision. *Lee*, 895 F.3d at 1371-72. To the extent that Mr. Burke is making any allegations that NHGRI actually "supervised" him, those allegations "are conclusory in nature and are not tied to any specific provision of the contracts that limits the manner in which the government was entitled to review [his] work." *Id.* at 1369. To the extent that Mr. Burke might be alleging "that the nature and degree of supervision to which [he was] actually subjected exceeded what was provided for in the contracts, that contention goes to whether the express contracts were breached, not to whether those contracts were valid." *Id.* at 1371. Without contractual terms containing a direct supervision requirement, there is no basis for redefining Mr. Burke's contract as one for personal services.

Mr. Burke complains that, in practice, he was also required to perform personal services that were outside the scope of his contract — specifically, conducting additional but unidentified gene therapy research, providing unidentified training for students and new arrivals, and assisting with laboratory emergencies and general laboratory upkeep — and that this fact should somehow affect how his contract should be viewed. His allegations in this regard are minimal and lack any specificity. On a motion to dismiss for failure to state a claim, a tribunal "need not accept allegations 'too meager, vague, or conclusory to remove the possibility of relief from the realm of mere conjecture.'" *Doe v. Stonehill College, Inc.*, 55 F.4th 302, 333 (1st Cir. 2022) (quoting *Saccoccia v. United States*, 955 F.3d 171, 174 (1st Cir. 2020)). Mr. Burke does not explain how the alleged "extra" duties were outside the scope of his contract or allege that they were subject to the type of direct supervision necessary to create a personal services contract. In any event, work that the agency requested

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[9] Further, the FAR factors are not all of equal importance, and characterization of a contract as one for personal services cannot be made simply by counting factors. *Associated Aero Science Laboratories, Inc.*, ASBCA 15831, 72-1 BCA ¶ 9333, at 43,288. Direct government supervision is by far the most important. *Lee*, 895 F.3d at 1371.

outside the scope of Mr. Burke's contract would not alter the actual terms of his written contracts and does not change the nature of the authorized contract work. *Lee*, 895 F.3d at 1371. We cannot find that Mr. Burke's purchase orders were personal services contracts.

C. If Personal Services Contracts, Whether They Should Be Voided

Even if Mr. Burke's purchase orders were for personal services, we can identify no reason that such a finding would invalidate or void his contract. "The fact that a contract may be inconsistent with a statutory or regulatory requirement does not *ipso facto* render the contract void." *Lee*, 895 F.3d at 1372. Instead, "[i]nvalidation of the contract . . . must be considered in light of the statutory or regulatory purpose, with recognition of the strong policy of supporting the integrity of contracts made by and with the United States." *Id.* (quoting *American Telephone & Telegraph Co. v. United States*, 177 F.3d 1368, 1374 (Fed. Cir. 1999) (en banc)). "Because of the disruptive effect of retroactively invalidating a government contract, . . . 'invalidation of a contract after it has been fully performed is not favored.'" *Id.* at 1372 (quoting *American Telephone & Telegraph*, 177 F.3d at 1375).

The Federal Circuit recognized in *Lee* that "section 37.104 of the FAR does not dictate that an executed contract will be deemed void simply because it is later determined that the degree of government supervision or other factors make the role of the contracting party more like that of an employee than an independent contractor." *Lee*, 895 F.3d at 1372. In applying that determination to the contracts in *Lee*, the Federal Circuit looked to congressional authorizations to the agency involved in that case, which allowed the agency to award a certain number of personal services contracts for the purpose of giving the agency greater flexibility in accomplishing its mission. The Federal Circuit in *Lee* viewed that as evidence that a violation of FAR 37.104 would not invalidate the plaintiffs' contracts. We have no similar evidence in this case about NIH's congressional authorizations, but, given the type of experience, education, knowledge, and training that the animal research model for which Mr. Burke was tagged with responsibility necessarily requires, we can see no reason why the Federal Circuit would view the situation here as somehow different from *Lee*, particularly where, as both here and in *Lee*, the contractors "have each contracted with the government over several years, through multiple contracts and contract renewals, most (if not all) of which have been fully performed and fully paid at the contract rate." *Id.* In such circumstances, the scale "weighs against invalidation of the . . . express contract." *Id.*

IV. Mr. Burke's Implied-In-Contract Argument

Mr. Burke argues that, even if his express contract theory fails, he should be compensated under a separate implied-in-fact contract into which NIH entered with him when it knowingly directed him to perform work that federal employees could have and perhaps should have performed. "An implied-in-fact contract is founded on a meeting of the

minds, which, *though 'not embodied in an express contract*, is inferred, as a fact, from conduct of the parties showing, in the light of the surrounding circumstances, their tacit understanding."' *Transworld Systems Inc. v. Department of Education*, CBCA 6049, 22-1 BCA ¶ 37,994, at 184,513 (2020) (quoting *Parsons Brinckerhoff Quade & Douglas, Inc.*, DOT CAB 1299, 84-2 BCA ¶ 17,309, at 86,266). As a matter of law, however, "[t]he existence of an express contract precludes the existence of an implied contract dealing with the same subject, unless the implied contract is entirely unrelated to the express contract." *Transworld Systems*, 22-1 BCA at 184,513 (quoting *Atlas Corp. v. United States*, 895 F.2d 745, 754-55 (Fed. Cir. 1990)). The existence of Mr. Burke's valid express contracts precludes the creation of a separate implied-in-fact contract with terms that differ from and conflict with the terms of the express contracts.

Mr. Burke argues that, because his express contracts neither contain FAR provisions nor list his specific job duties, they are too indefinite to enforce, leaving no express contracts in place and opening the door to an implied-in-fact contract. Yet, "once it is determined that the parties did indeed intend to create a contract, courts should be slow to deny enforcement on the basis of indefiniteness in the contract." *Aviation Contractor Employees, Inc. v. United States*, 945 F.2d 1568, 1572 (Fed. Cir. 1991) (citing 1 Arthur L. Corbin, Corbin on Contracts § 97 (1963)). Here, there is no question about the parties' original intent to contract: Mr. Burke provided quotes, and NIH issued purchase orders adopting those quotes. Mr. Burke's quotes and the resulting OF-137s are supplemented by Mr. Burke's allegations and understanding of what his contracts required. Although it is odd that his purchase orders identify no FAR clauses, that, in and of itself, does not render them too indefinite to enforce, given that, at least to some extent, missing mandatory FAR clauses may be read into the contract. *G.L. Christian & Associates v. United States*, 320 F.2d 345, 350 (Ct. Cl. 1963); *Safe Haven Enterprises, LLC v. Department of State*, CBCA 3871, et al., 16-1 BCA ¶ 36,444, at 177,624. To the extent that questions remain about terms, "[m]any a gap in terms can be filled, and should be, with a result that is consistent with what the parties said and that is more just to both of them than would be a refusal of enforcement." *Lee v. Joseph E. Seagram & Sons, Inc.*, 552 F.2d 447, 453 (2d Cir. 1977) (citation omitted). Mr. Burke's purchase orders are not too indefinite to enforce.

Further, even without the existence of his express contracts, it is clear that, for an implied-in-fact contract to come into existence, the contractor must show "(1) mutuality of intent, (2) consideration, (3) an unambiguous offer and acceptance, and (4) 'actual authority' on the part of the government's representative to bind the government in contract." *Hanlin v. United States*, 316 F.3d 1325, 1328 (Fed. Cir. 2003). "[T]he requirements for an implied-in-fact contract are the same as for an express contract; only the nature of the evidence differs." *Id.* As part of that evidence, there has to be a showing of some kind of action on the Government's part "to indicate its willingness to pay the charges" for which the contractor is seeking payment. *City of Cincinnati v. United States*, 153 F.3d 1375, 1378

(Fed. Cir. 1998). Mr. Burke has not alleged any factual information to support an argument that government officials thought or intended that he should be paid the same wages as federal civil service employees. To the contrary, the fact that NIH issued purchase orders identifying payment obligations correlating with the price quotes that Mr. Burke had previously provided leaves no room for arguing that NIH thought that it was agreeing to pay Mr. Burke federal employee wages and benefits. Mr. Burke's implied-in-fact contract argument must fail.

V. Mr. Burke's Unjust Enrichment Argument

Mr. Burke argues that he should receive the equivalent of a federal employee salary under a theory of unjust enrichment. "The essence of an unjust enrichment claim is that, although no valid contract, either express or implied in fact, exists between the parties, justice requires that we create an obligation of a contractual nature " – an implied-in-law contract – "for the sake of providing a remedy." *Arcadis U.S., Inc. v. Department of the Interior*, CBCA 918, 08-1 BCA ¶ 33,807, at 167,354. We lack jurisdiction to consider implied-in-law contract claims or to provide the type of *quantum meruit* award that Mr. Burke requests. *Flux Resources, LLC v. Department of Energy*, CBCA 6208, 19-1 BCA ¶ 37,338, at 181,589; *United Rentals, Inc.*, HUD BCA 03-D-100-C1, 06-1 BCA ¶ 33,131, at 164,188 (2004); *Energroup, Inc.*, EBCA 413-5-88, 89-1 BCA ¶ 21,233, at 107,105-06 (1988). Even if we could assert jurisdiction, Mr. Burke was performing under valid contracts with NIH, precluding an unjust enrichment award. *See Arcadis U.S.*, 08-1 BCA at 167,354 (finding that unjust enrichment cannot apply where "there was a valid contract that required [appellant] to perform").

VI. Jurisdiction To Consider Mr. Burke's Non-CDA Claims

Mr. Burke cites to three statutes — the Fair Labor Standards Act (FLSA), 29 U.S.C. § 209; the McNamara-O'Hara Service Contract Act (SCA), 41 U.S.C. § 6703; and the Back Pay Act (BPA), 5 U.S.C. § 5596 — that he argues entitle him to relief. We lack jurisdiction to grant direct relief under those statutes. The Board derives its jurisdiction and authority to resolve monetary disputes against the Government from the CDA. *Automated Power Systems, Inc.*, DOT BCA 2707, 98-1 BCA ¶ 29,494, at 146,345. "Unless an appeal is within the purview of the [CDA], the Board has no jurisdiction to consider the dispute." *Id.* To the extent that Mr. Burke is seeking direct relief under the FLSA, SCA, and BPA, we lack jurisdiction to entertain his request.

Decision

Mr. Burke's appeal is **DENIED**.

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

We concur:

Erica S. Beardsley
ERICA S. BEARDSLEY
Board Judge

Kathleen J. O'Rourke
KATHLEEN J. O'ROURKE
Board Judge