



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

CROSS-MOTIONS FOR SUMMARY JUDGMENT DENIED:
February 2, 2024

CBCA 6385, 6487, 7423(6292)-REM, 7424(6386)-REM, 7425(6581)-REM,
7426(6582)-REM, 7427(6801)-REM, 7428(6543)-REM

CSI AVIATION, INC.,

Appellant,

v.

DEPARTMENT OF HOMELAND SECURITY,

Respondent in CBCA 6385, 7423(6292)-REM,
7425(6581)-REM, and 7427(6801)-REM,

and

GENERAL SERVICES ADMINISTRATION,

Respondent in CBCA 6487, 7424(6386)-REM,
7426(6582)-REM, and 7428(6543)-REM.

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Cassandra A. Maximous, Gabe E. Kennon, and Andrea A. Adibe, Office of the Principal Legal Advisor, Immigration and Customs Enforcement, Department of Homeland Security, Washington, DC, counsel for Respondent in CBCA 6385, 7423(6292)-REM, 7425(6581)-REM, and 7427(6801)-REM.

Matthew D. McKenzie, Office of General Counsel, General Services Administration, Washington, DC, counsel for Respondent in CBCA 6487, 7424(6386)-REM, 7426(6582)-REM, and 7428(6543)-REM.

Before Board Judges **VERGILIO**, **GOODMAN**, and **SULLIVAN**.

Opinion for the Board by Board Judge **SULLIVAN**. Board Judge **VERGILIO** writes separately.

SULLIVAN, Board Judge.

General Services Administration (GSA) awarded a schedule contract for flight brokerage services to CSI Aviation, Inc. (CSI). Department of Homeland Security, Immigration and Customs Enforcement (ICE), awarded five separate task orders to CSI on the schedule contract. CSI submitted eight claims – four claims to the ICE contracting officer and four claims to the GSA contracting officer. CSI filed eight appeals, challenging the denials or deemed denials of those claims. The Board partially consolidated the appeals, and, thus, we will consider together the four pending appeals in which Department of Homeland Security is respondent – CBCA 6385, CBCA 7423(6292)-REM, CBCA 7425(6581)-REM, and CBCA 7427(6801)-REM – and the four pending appeals in which GSA is respondent – CBCA 6487, CBCA 7424(6386)-REM, CBCA 7426(6582)-REM, and CBCA 7428(6543)-REM. Board’s Order (Aug. 26, 2020) at 2.

In this decision, we address the parties’ cross-motions for summary judgment in each of these appeals. While we are able to resolve the contract interpretation issues presented in the parties’ motions regarding the schedule contract, we deny summary judgment because there are disputed material facts regarding the application of those interpretations to the claims arising from the ICE task orders.

In CBCA 6385 and 6487, CSI challenges ICE’s claim for liquidated damages related to the unavailability of a flight crew, as excused under the Excusable Delay clause in its terms and conditions in the schedule contract. We deny both parties’ motions and will conduct further proceedings to determine whether the cancellation of that flight was beyond CSI’s control.

In CBCA 7423(6292)-REM, 7424(6386)-REM, 7427(6801)-REM, and 7428(6543)-REM, CSI seeks payment for flights that were cancelled by ICE with less than fourteen days’ notice. We hold that the cancellation provision is an operative provision of the schedule contract and not in conflict with the termination for convenience provision of the Commercial Items clause. We deny summary judgment for CSI because there are factual

disputes as to whether CSI waived application of the cancellation provision and which flights were cancelled and why. We also hold that ICE's cancellation or rescheduling of the flight at issue in CBCA 7423(6292)-REM and 7424(6386)-REM is not excused pursuant to the sovereign acts doctrine, but we leave the question of whether the flight was cancelled or rescheduled for further proceedings.

In CBCA 7425(6581)-REM and 7426(6582)-REM, CSI seeks additional payments for flights based upon a provision of the schedule contract that allows CSI to round flight times up to the nearest hour. We hold that the rounding provision is an operative part of the schedule contract. But we deny the parties' motions for summary judgment and will hold further proceedings on ICE's allegation that CSI waived application of the rounding provision and on CSI's proof of quantum.

Contract Terms and Findings of Undisputed Fact

I. Schedule Contract Award and Relevant Terms

In 2009, GSA awarded a schedule contract to CSI to provide air charter brokerage services and related support items – special item numbers (SINs) 599-5, Air Charter Service-Brokers, and 599-1000, Contract Support Items (Auxiliary Supplies/Services). Appeal File, Exhibit 75 at 4043, 4044.¹ For SIN 599-5, the awarded prices were “the [commercial price list] air charter service block-hour pricing rates as shown on the attached Commercial Price List.” *Id.* at 4044. The award was predicated upon CSI providing the same rates that it provided all of its commercial customers. *Id.*

Payment provision. The payment provision of the schedule contract required CSI to provide a should-cost estimate prior to flight and then a final invoice with all charges after the flight:

Task Orders for this contract will be firm fixed priced. Contractor agrees to provide a should-cost estimate for each task order with all knowable costs itemized before flight. The final invoice should include all actual block hour and auxiliary service charges that apply to the task order requirements. The Contractor shall explain any/all differences between the pre-flight should cost estimate and post-flight invoiced costs to the ordering agency.

Exhibit 75 at 4044.

¹ All exhibits are found in the appeal file, unless otherwise noted.

Commercial Items clause. The schedule contract incorporated the Commercial Items clause, Federal Acquisition Regulation (FAR) 52.212-4 (48 CFR 52.212-4 (2009)), which included three provisions relevant to deciding the parties' motions. First, the clause defined excusable delay as an event beyond CSI's reasonable control:

Excusable delays. The Contractor shall be liable for default unless nonperformance is caused by an occurrence beyond the reasonable control of the Contractor and without its fault or negligence such as, acts of God or the public enemy, acts of the Government in either its sovereign or contractual capacity, fires, floods, epidemics, quarantine restrictions, strikes, unusually severe weather, and delays of common carriers.

Exhibit 75 at 4086. Second, the clause permitted the Government to terminate for its convenience and defined the amount owed to the contractor as the result of termination:

[T]he Contractor shall be paid a percentage of the contract price reflecting the percentage of the work performed prior to the notice of termination, plus reasonable charges the Contractor can demonstrate to the satisfaction of the Government using its standard record keeping system, have resulted from the termination.

Id. at 4087-88. And, third, the clause defined the order of precedence for the interpretation of inconsistent clauses in the solicitation or contract:

Order of precedence. Any inconsistencies in this solicitation or contract shall be resolved by giving precedence in the following order: (1) the schedule of supplies/services; (2) the Assignments, Disputes, Payments, Invoice, Other Compliances, and Compliance with Laws Unique to Government Contracts paragraphs of this clause; (3) the clause at 52.212-5; (4) addenda to this solicitation or contract, including any license agreements for computer software; (5) solicitation provisions if this is a solicitation; (6) other paragraphs of this clause; (7) the Standard Form 1449; (8) other documents, exhibits, and attachments; and (9) the specifications.

Id. at 4088. The schedule contract included another Order of Precedence clause, FAR 52.216-18, which provided that, in the event of a conflict between the schedule contract and any task orders, the terms of the schedule contract prevail. *Id.* at 4097.

Addendum to FAR 52.212-4. In a section titled "Addendum to 52.212-4," GSA included the following provisions that inform the Board's analysis. Exhibit 75 at 4089.

Time for Delivery. General Services Acquisition Regulation (GSAR) clause 552.211-78 (48 CFR 552.211-78) provided that the time for delivery would be in accordance with the terms in the agency's order:

Time of Delivery (for services). The contractor shall deliver or perform services in accordance with the terms negotiated in the agency's order. The contractor shall not propose in excess of his standard commercial delivery or performance times to agencies without giving notice to the Ordering Officer of his intent to do so.

Exhibit 75 at 4096.²

GSAR clause 552.238-71 required CSI to provide "one copy of its Authorized FSS [Federal Supply Schedule] Schedule Pricelist to any authorized schedule user, upon request." Exhibit 75 at 4101. Clause I-FSS-600 provided instructions on how CSI was to prepare the price list for distribution:

Using the commercial catalog, price list, schedule, or other document as accepted by the Government, showing accepted discounts, and obliterating all items, terms, and conditions not accepted by the Government by lining out those items or by a stamp across the face of the item stating "NOT UNDER CONTRACT" or "EXCLUDED," or

Composing a price list in which only those items, terms, and conditions accepted by the Government are included, and which contain only net prices, based upon the commercial price list less discounts accepted by the Government.

Id. at 4104.

In a clause titled "Termination of Task Orders," the schedule contract gave any agency the right to terminate task orders that it may issue under the schedule contract: "Any ordering office may, in respect to any one or more task orders placed by it under the contract, exercise the same right of termination as described in FAR clause 52.212-4, subparagraph l)

² Neither party has discussed the application and import of this clause in relation to the disputes, but, as discussed later, it may be relevant in deciding CSI's claim for cancelled flights.

Termination for the Government's convenience, and subparagraph m) Termination for Cause." Exhibit 75 at 4122.

Price Reductions. The schedule contract also included a provision governing price reductions, GSAR 552.238-75. Exhibit 75 at 4125. Pursuant to this provision, CSI agreed to report to the contracting officer all price reductions to the customer that were the basis of the award and the Government's price or discount relative to this customer. *Id.* The clause directed that "[a]ny change in the Contractor's commercial pricing or discount arrangement applicable to the identified customer (or category of customer) which disturbs this relationship shall constitute a price reduction." *Id.* The clause directed that a price reduction "shall apply to purchases under this contract" if CSI granted "more favorable discounts or terms and conditions than those contained in the commercial catalog, pricelist, schedule or other documents upon which contract award was predicated." *Id.*

Solicitation Provision Regarding Flight Cancellation Provision. In the solicitation for the schedule contract, GSA anticipated the need for agencies to cancel flights with a cancellation charge to be assessed by the contractor:

FLIGHT CANCELLATIONS:

- (a) The ordering agency may cancel the trip at any time prior to the initial flight subject to a cancellation charge. If a cancellation charge is assessed, it shall be no greater than that assessed to commercial customers and must be identified in the GSA Schedule. If the ordering agency cancels a return flight, it may be subject to the full cost of the trip.

- (b) The Contractor shall return to the ordering agency any money received for a trip that is cancelled by the carrier for any reason other than a cancellation by the ordering agency.

Exhibit 20 at 624.

II. CSI's Terms and Conditions

A. Applicable Version

As explained below, the United States Court of Appeals for the Federal Circuit held that CSI's terms and conditions were incorporated by reference into the GSA schedule contract. There are four versions of CSI's terms and conditions in the common record for these appeals: one dated October 2008, which is found in the GSA contract file (Exhibit 75

at 4291-93); another dated February 2009, which is cited in CSI's final offer to GSA prior to the award of the schedule contract (Exhibit 41A); a third version dated December 2011, which CSI provided to ICE in 2012 (Exhibit 112); and a fourth version dated February 2014, which CSI asserts contained the operative provisions at the time the task orders were issued (Exhibit 47). CSI asserts that we should analyze the 2014 version because that version was in effect at the time of the issuance of the ICE task orders and CSI's repeated submission of updated terms and conditions to GSA answers the Government's claim of waiver. Transcript at 7. During the term of the schedule contract, CSI periodically provided GSA with updated price schedules, all of which stated that CSI's current terms and conditions would apply to operations. *E.g.*, Appellant's Statement of Undisputed Material Facts (CBCA 7425(6581)-REM, 7426(6582)-REM) ¶¶ 23-72. ICE and GSA urge us to only consider the 2008 version. Transcript at 13.

The Federal Circuit directed that "the Board's resolution should account for the effective date of the Schedule Contract, March 10, 2009," suggesting that the February 2009 version should be the version we interpret. *CSI Aviation, Inc. v. Department of Homeland Security*, 31 F.4th 1349, 1357 n.3 (Fed. Cir. 2022). In comparing the different versions, we find that while the paragraph numbering and location of specific clauses may change, there are no material differences in the terms relevant to the Board's analysis.³ Accordingly, we will follow the Federal Circuit's guidance and refer to the 2009 version in our analysis. This version will be referred to as CSI's terms and conditions hereinafter. We defer for further proceedings a determination, if necessary, regarding the significance of CSI's repeated submission of its terms and conditions to the GSA contracting officer.

B. Relevant Terms of the February 2009 Version

CSI's terms and conditions contain several provisions that are at issue in deciding the parties' motions. CSI's terms and conditions allowed for the chartering agency to request changes to the departure time, dates, routing, or aircraft type, but those changes were subject to approval by CSI and the air carrier. Exhibit 41A at 2937. The parties have not provided an explanation as to how this provision affects the flights that were purportedly cancelled. CSI's terms and conditions also specified payment terms and that "[e]stimated or actual block hours, if applicable, will be rounded up to the nearest hour." *Id.* This provision is the basis for CSI's claim that it can round up its hours on its invoices. Chartering agencies were responsible for "obtaining all necessary travel documents and for complying with the laws of each country" for the "transportation [of] passengers across any international boundary."

³ The 2014 version of the terms and conditions contained a severability provision. Exhibit 47 at 180.

Id. at 2938. ICE’s assertion that some of the flights were cancelled due to the actions of foreign governments will be examined in light of this provision. CSI’s terms and conditions specified cancellation charges: “If no cancellation charges are set forth on the first page of this agreement, then a [25%] non-refundable cancellation charge will apply for up to [fourteen] days prior to flight, and [100%] cancellation charge will apply if less than [fourteen] days prior to flights.” *Id.* at 2939. This provision is the basis for CSI’s claim for cancellation charges. Finally, in the provision regarding “liability of service to passengers,” CSI’s terms and conditions addressed CSI’s liability, if any, if it was required to cancel a flight:

The Air Carrier or CSI, with or without notice to the Charterer, may delay or cancel any flights or revise the routing of flights from the routing designated in the Agreement, without liability for penalties or damages, or whenever such actions is necessary to comply with any governmental request for emergency transportation in connection with the national defense, or whenever such action is necessary or would jeopardize the safety of passengers because of an Act of God, seizure under legal process, sanctions, quarantine restrictions, fire, smog, fog, flood, weather conditions, mechanical difficulties, riots or civil or political unrest, strikes or labor disputes causing cessation, slow down or interruption of work (whether resulting from disputes between the Air Carrier and its employees or between other parties), war or hazards or dangers incident to a state of war, any act of government, regulations, orders and any other acts or matters, whether or not of a similar nature, beyond the control of the Air Carrier. Whenever the Air Carrier cancels the flights at a point other than the destination designated in the Agreement for any of the reasons specified herein, CSI and the Air Carrier shall refund all sums received by it on account of the Total Cost, except that portion attributable to transportation performed and such transportation as may be necessary to return passengers to their origination airport.

Id. This provision is the basis for CSI’s defense to ICE’s claim for liquidated damages for the flight at issue in CBCA 6385 and CBCA 6487.

C. CSI’s Proposal for the Schedule Contract

CSI anticipated, in three separate locations in its proposal for the schedule contract, flight delays due to crew requirements. It promised to be proactive and address the need for additional flight crews to ensure no flight delays:

Whenever there is a need for additional crews to meet mission requirements, such as when the extended duration of a trip would require a crew to exceed its legal duty day, CSI will ensure that additional flight crews are positioned to accommodate such limitations. Additional flight crews will be positioned so they are ready to fly within the required response time.

Exhibit 75 at 4299; *see also id.* at 4297 (“All crew members involved are certified to [Federal Aviation Administration (FAA)] operating standards and will adhere to all crew member duty limitations. . . . If required, CSI will pre-position and/or provide back-up crews so that there is no delay in your travel schedule.”), 4298 (“CSI will provide technical advice concerning prospective destinations if we feel that another option would better facilitate the operation. We will make alternate recommendations and provide solutions to assist you in your decision process. Everything from the availability of deicing equipment to ground handling limitations will be considered.”).

D. Pre-Contract Exchange About Terms and Conditions

Prior to the execution of the schedule contract, the GSA contracting officer asked CSI about which entities would be bound by CSI’s terms and conditions and noted the possible need for legal review:

regarding the CSI Terms and Conditions document submitted to us, is GSA required to initial off on these or are these requirements for ordering agencies to comply with? If so, I am going to have to submit these for Legal review as we haven’t had to agree to terms like these from other air charter providers.

Exhibit 23 at 840. CSI responded: “Regarding the Terms and Conditions, they were just provided for your information.” *Id.* at 842.

III. ICE Task Orders and Relevant Terms

In 2014, under the 2009 schedule contract, ICE awarded five task orders to CSI to provide “unscheduled air charter services in accordance with 14 CFR 121 or 14 CFR 135” to various domestic and international destinations. *E.g.*, Exhibit 181 at 6644.⁴ In the

⁴ All of the task orders are included in Exhibit 181 and appear to contain the same terms. One difference between the task orders, however, is that the flights would originate from different locations. *See* Exhibit 181 at 6643 (Miami, Florida), 6692 (Alexandria, Louisiana), 6740 (Mesa, Arizona), 6788 (San Antonio, Texas), and 6836

statement of work issued with the request for quotations and appended to the task orders, ICE defined flight hours as “the actual time in hours and minutes for each leg commencing when the aircraft starts movement for flight under its own power and ending when the aircraft comes to rest at the destination gate or parking location.” *Id.* at 6674.⁵

In a section labeled “Invoicing,” ICE detailed the requirements for invoices to be submitted and stated that hours were not to be rounded up or down:

10. Invoicing

10a. Except for the final invoice, invoices will cover a period of 30 days and will include: 1) dates and routes of each flight with domestic and/or international hours flown; 2) subtotals of domestic and/or international hours flown during the invoice period with associated costs; 3) total hours and total wet lease cost for the invoice period; and, 4) an attached copy of the flight log used to determine billable flight hours.

10b. Flight hours are the actual time in hours and minutes for each leg commencing when the aircraft starts movement for flight under its own power and ending when the aircraft comes to a rest at the destination gate or parking location. For billing purposes, flight hours shall be expressed in actual hours and minutes only. Minutes shall not be rounded up or down. Charges will be computed using flight time for each leg in hours, plus minutes (expressed in hundredths of an hour), multiplied by the cost per flight hour.

Exhibit 181 at 6674. In a paragraph labeled “Summary Reports,” ICE detailed the requirement for CSI to provide, among other reports, “[w]eekly invoice summary reports detailing charges for that week, total cumulative charges, total flight hours to date, and flight hours/funding remaining on the contract.” *Id.* at 6677. In its proposals in response to the request for quotations, CSI agreed to “provide invoices and reports as required” and stated that “[a]ll aircraft, personnel and operations offered herein will also comply with [the statement of work].” *E.g.*, Exhibit 180 at 6415, 6419.

(Brownsville, Texas). A second difference is that only the task order for Brownsville, Texas, appears to incorporate CSI’s proposal in response to the request for quotations into the task order. *Id.* at 6836.

⁵ This definition accords with the definition of block hours. Appellant’s Statement of Undisputed Material Facts (7425(6581)-REM, 7426(6582)-REM) ¶ 7.

The statement of work described the need to provide both long-range international charter (LRIC) flights and daily scheduled large aircraft charter flights, which would be aircraft based in four locations capable of providing “daily scheduled flights to Central America, South America, the Caribbean, or domestic destinations.” Exhibit 181 at 6665. The daily flights were to be to “single or multiple destinations normally with a maximum of [nine] hours flight time scheduled per day.” *Id.* at 6667. “To facilitate flight planning, schedule requirements will usually be provided to the Contractor no later than [twenty-four] hours prior” to the scheduled departure time for the initial flight segment. *Id.* For LRIC flights, CSI was required to provide flight and crew information to ICE within forty-eight hours of the award of a flight, but the statement of work contains no language regarding when ICE would provide schedule requirements to CSI. *Id.* at 6669.

The statement of work addressed the possibility of delays or cancellations caused by CSI, providing that, “[i]n the event the aircraft/flight crew/security crew/flight [were] not available” at the scheduled departure time, the flight would be deemed “non-available” and could be cancelled by the contracting officer’s representative. Exhibit 181 at 6668. The statement of work warned that the contractor could be “assessed costs incurred by the Government resulting from a cancelled or non-available flight. Liquidated damages will not exceed the value that the contractor would have charged for the flight.” *Id.* The statement of work also directed offeror’s attention to the Liquidated Damages clause, FAR 52.211-11. *Id.* at 6668, 6670. The statement of work was silent as to the remedy for cancellations by ICE.

Regarding the use of multiple crews for LRICs, the statement of work advised that “LRIC flights will be completed with the minimum number of flight crew members required to meet the schedule at the most economical cost to the government.” Exhibit 181 at 6666; *see also id.* at 6673 (“Pricing. Task Orders will be awarded as a total wet lease to include aircraft, flight crew (using the minimum number required to complete the flight) . . .”). CSI could invoice for costs of “flight crew augmentation to permit longer flights,” “crew remaining overnight,” and “crew staging to permit longer flights,” but only with the prior approval of the contracting officer’s representative. *Id.* at 6674. ICE was responsible for all communications with foreign governments. *Id.* at 6665.

IV. Events Leading to and Amounts in Dispute

A. CBCA 6385, 6487 – Unavailable CSI Flight Crew

The dispute in CBCA 6385 and 6487 arises from CSI’s inability to provide a flight crew to continue a flight to return passengers to Somalia. The flight left from Texas with a crew change stopover scheduled in Dakar, Senegal. Respondents’ Statement of

Undisputed Material Facts (CBCA 6385, 6487) (Nov. 30, 2022) ¶ 80. CSI and its subcontracted air carrier determined that two flight crews – the original crew from Texas, and the replacement crew stationed in Senegal – were the “minimum number of flight crews necessary to complete the Mission,” and they “had no reason to believe that two flight crews would be insufficient to complete the Mission on schedule.” Appellant’s Statement of Undisputed Material Facts (CBCA 6385, 6487) (Nov. 30, 2022) ¶¶ 27, 29.⁶ A power outage occurred at the hotel in Dakar where the replacement crew was staying, and the air carrier was unable to find a different hotel, in part because of a large conference occurring in Dakar. *Id.* ¶¶ 36-38. Because of the power outage, the replacement crew was unable to obtain the eight hours of rest required by FAA regulations.⁷ *Id.* ¶ 40.

CSI asserts that the power outage was beyond its control, based upon the declaration of its president and chief operating officer, Mr. Collins. Exhibit 175. Mr. Collins declares that CSI had “no reason to believe that two crews would be insufficient to complete” the flight on schedule or that something would happen to prevent the crew from obtaining the necessary rest. *Id.* ¶¶ 4-5. Mr. Collins also states that CSI had arranged flights before the flight at issue through Dakar and had not experienced delays due to inadequate rest for the crew. *Id.* ¶ 6.⁸ Mr. Collins does not address what steps CSI took to address the possibility that the crew would not be able to obtain adequate rest. ICE asserts that Mr. Collins’ statements lack foundation but offers no evidence for that assertion. ICE also provides no proposed facts regarding the cause of CSI’s inability to perform the flight.

After CSI notified ICE that its crew was unavailable due to inadequate rest, the agency attempted to extend the time that Somalia would accept passengers, but the Somali

⁶ ICE and GSA do not dispute CSI’s belief that two flight crews would be sufficient, but they contend that this belief is irrelevant to the Board’s determination. Respondents’ Statement of Genuine Issues (CBCA 6385, 6487) (Dec. 30, 2022) ¶ 29.

⁷ When this flight was scheduled in 2017, FAA regulations required that a flight crew member be provided a ten-hour rest period with an opportunity for “a minimum of [eight] uninterrupted hours of sleep” immediately prior to reporting for flight duty. 14 CFR 117.25(e) (2017). Regulations further provided that “[t]he flightcrew member cannot report for the assigned flight duty period until he or she receives the rest period specified in paragraph (e).” *Id.* 117.25(f).

⁸ ICE/GSA disputes CSI’s proposed finding regarding its past experience but offers no contrary evidence that CSI had experienced difficulties in the past. Instead, ICE and GSA simply object that CSI’s past experience is “irrelevant.” Respondents’ Statement of Genuine Issues (CBCA 6385, 6487) ¶ 31.

Government declined the request. Respondents' Statement of Undisputed Material Facts (CBCA 6385, 6487) ¶¶ 93-95. Then, ICE asked CSI to return the passengers to the United States. *Id.* ¶ 96.

On August 15, 2018, CSI submitted a certified claim to the ICE contracting officer seeking payment of \$495,012.56, for the portion of the charter that it did complete. Appellant's Statement of Undisputed Material Facts (CBCA 6385, 6487) ¶ 49; Exhibit 135 at 5887. The ICE contracting officer, in a decision issued November 21, 2018, agreed that CSI was owed that amount for the flight but asserted a claim for \$844,606 in liquidated damages resulting from the unavailability of the flight crew. Appellant's Statement of Undisputed Material Facts (CBCA 6385, 6487) ¶¶ 50-53; Exhibit 122 at 5836. Taking credit for the amount owed to CSI for the flight, ICE sought payment of \$349,593. Exhibit 122 at 5836. CSI appealed that determination, and the appeal was docketed as CBCA 6385. CSI submitted the same claim to GSA's contracting officer for the schedule contract and then filed a "deemed denial" appeal with the Board. That second appeal was docketed as CBCA 6487.⁹

B. CBCA 7423(6292)-REM, 7424(6386)-REM – Court Injunction Prevents Flight

The dispute in CBCA 7423(6292)-REM and 7424(6386)-REM involves the same passengers who were to be flown to Somalia. ICE scheduled a flight with CSI to depart between December 20 and 22, 2017. Respondents' Statement of Undisputed Material Facts (CBCA 7423(6292)-REM, 7424(6386)-REM) ¶ 71. On December 19, 2017, the United States District Court for the Southern District of Florida issued an order staying the removal of the Somali nationals. *Id.* ¶¶ 73-74; Exhibit 12 at 0428. ICE notified CSI of the injunction and postponed the flight. Respondents' Statement of Undisputed Material Facts (CBCA 7423(6292)-REM, 7424(6386)-REM) ¶ 75. ICE rescheduled the flight to depart on March 1, 2018, but apparently this flight was cancelled. *See id.* ¶ 77; Respondents' Motion for Summary Judgment, Attachment 1 (Declaration of Robert F. Cordero (Dec. 7, 2022)) ¶ 25. ICE does not explain why the second flight was cancelled, but a fee for that flight cancellation is included in the claim before the Board in CBCA 7427(6801)-REM and 7428(6543)-REM. Respondents' Statement of Undisputed Material Facts (CBCA 7423(6292)-REM, 7424(6386)-REM) ¶ 77.

On January 11, 2018, CSI submitted an invoice for \$983,901.25 (39.25 flight hours estimated for the flight multiplied by the hourly rate of \$25,065) for the December 20, 2017, flight. Appellant's Statement of Undisputed Material Facts (CBCA 7423(6292)-REM,

⁹ These cases were not appealed to the Federal Circuit and, thus, retain their original docket numbers.

7424(6386)-REM) ¶ 90. After ICE did not pay the invoice, CSI submitted a certified claim for the amount on July 25, 2018. *Id.* ¶ 92. The ICE contracting officer denied the claim in September 2018. Respondents' Statement of Undisputed Material Facts (CBCA 7423(6292)-REM, 7424(6386)-REM) ¶ 86. ICE also referred the claim to the GSA contracting officer, who denied it in November 2018. *Id.* ¶¶ 87-88. CSI filed timely appeals of both decisions, and the appeals were docketed as CBCA 6292 and 6386, respectively. Following remand from the Federal Circuit, they are now docketed as CBCA 7423(6292)-REM and 7424(6386)-REM.

C. CBCA 7425(6581)-REM, 7426(6582)-REM – Claim for Rounded-Up Hours

In CBCA 7425(6581)-REM and 7426(6582)-REM, CSI seeks \$27 million for more than 6000 flights for which its initial invoices did not round up the hours of the flight to the nearest hour as permitted by the rounding up provision of its terms and conditions. *See* Exhibits 176 at 6115, 184. CSI's claim is based upon twenty-four invoices that it submitted in 2019 as part of the contract closeout process. Exhibit 176 at 6111-13.¹⁰ There are 615 pages of invoices, and each invoice covers a period of weeks or months during which CSI brokered multiple flights. It appears that CSI rounded up the flight times for each flight to the nearest hour and multiplied the difference between the original flight time and the rounded-up hours by the price-per-flight-hour. *See id.* at 6112. CSI has not provided the original invoices that show the original hours billed or any other proof that the claimed amount is correct. ICE objects to the claimed amount, asserting that CSI has never explained its claim. Respondents' Opposition to Appellant's Motion for Summary Judgment (CBCA 7425(6581)-REM, 7426(6582)-REM) at 23. At argument, CSI's counsel represented that the explanation for how the claim was compiled could be found in the claim to ICE, but we do not see it. Transcript at 169: *see* Exhibit 184.

When ICE did not pay the invoices, CSI submitted its claim to both the ICE and GSA contracting officers on May 29, 2019. Exhibit 176 at 6111. In August 2019, CSI appealed the denial of the claim by the ICE contracting officer and the deemed denial by the GSA contracting officer. These appeals were docketed as CBCA 6581 and 6582. Following remand from the Federal Circuit, they are now docketed as CBCA 7425(6581)-REM and 7426(6582)-REM.

¹⁰ ICE and GSA challenge CSI's claim, in part, because one of the invoices was not presented to the contracting officer. The ICE contracting officer noted the missing invoice in his decision. Respondents' Statement of Undisputed Material Facts (7425(6581)-REM, 7426(6582)-REM) ¶ 86.

In the first year of contract performance, ICE discovered that CSI was rounding up its hours to the nearest tenth of an hour and directed CSI to follow the invoicing provisions of the statement of work and bill only based upon hours and minutes flown. Respondents' Statement of Undisputed Material Facts (7425(6581)-REM, 7426(6582)-REM) ¶¶ 76-77. ICE further directed CSI to repay the amounts based on this rounded-up billing. *Id.* ¶ 79. CSI repaid the amounts. *Id.* ¶ 81. CSI asserts that it submitted invoices in accordance with the invoicing provision because ICE threatened to withhold payment on CSI's invoices if CSI failed to do so. Appellant's Statement of Undisputed Material Facts (7425(6581)-REM, 7426(6582)-REM) Proposed Findings (7425(6581)-REM, 7426(6582)-REM) ¶ 81 (citing Exhibit 188, interrogatory response making the same assertion). ICE and GSA dispute this assertion, arguing that there is no support in the record. Respondents' Statement of Genuine Issues (7425(6581)-REM, 7426(6582)-REM) ¶ 81.

D. CBCA 7427(6801)-REM, 7428(6543)-REM – Claim for Cancellation Fees

In 7427(6801)-REM and 7428(6543)-REM, CSI seeks \$37 million for more than 600 flights it contends were cancelled within fourteen days of the scheduled flight.¹¹ The earliest purportedly cancelled flight was scheduled to occur in April 2014. Appellant's Statement of Undisputed Material Facts (7427(6801)-REM, 7428(6543)-REM) ¶ 88. CSI asserts that ICE has agreed that it cancelled 359 flights within fourteen days of the scheduled flight. *Id.* ¶¶ 86-87. In response, ICE contends that these flights were cancelled within the usual procedure for flight scheduling, which permitted ICE to give CSI its schedule twenty-four hours prior to scheduled flight time. Respondents' Statement of Genuine Issues (7427(6801)-REM, 7428(6543)-REM) ¶ 86. For the remaining 259 flights, ICE asserts approximately 100 flights were either rescheduled, combined with another mission, the flight path was modified despite the flight and mission remaining the same, or occurred as scheduled. Respondents' Statement of Undisputed Material Facts (7427(6801)-REM, 7428(6543)-REM), Attachments A, C.

In addition, ICE identifies another approximately 100 flights that were not present on the flight schedules or the flight details did not match any mission or flight for the day in question. Respondents' Statement of Undisputed Material Facts (7427(6801)-REM, 7428(6543)-REM), Attachment B. ICE also contends that the remaining flight cancellations should be excused for various reasons, such as sovereign acts (holidays in receiving country, airport closures, denial of entry by foreign governments), acts of God stemming from illness

¹¹ The number of cancelled flights has changed during the briefing on summary judgment, with CSI dropping some flights in light of ICE's challenges and adding others. Appellant's Reply in Support of its Motion for Summary Judgment (CBCA 7427(6801)-REM, 7428(6543)-REM) at 21-29.

or inclement weather, or CSI's failure to perform. *Id.*, Attachment E. Finally, ICE and GSA challenge the prices claimed by CSI for the flights allegedly cancelled, arguing that the only evidence CSI presents is post-hoc invoices submitted as precursors to its eventual claim with the Board, untethered "to any evidence in the appeal file." *E.g., id.* ¶ 89.

CSI, in response, does not substantively address the Government's reasons for disputing the individual flights; instead, CSI simply denotes that "[it] has already shown that ICE informed CSI that it was cancelling this flight less than 14 days before the flight was scheduled to occur." *E.g.*, Appellant's Reply In Support of Its Motion for Summary Judgment (7427(6801)-REM, 7428(6543)-REM), Exhibit 1 at 3. For the flights that ICE claims were never scheduled, CSI argues that there is no evidence or authority requiring a flight to have been scheduled for a cancellation to have occurred. *Id.* CSI further asserts that the omission of the flight from any flight schedules supports the claim that there was a cancellation. *Id.*

On April 26, 2019, CSI submitted its claim to both the ICE and GSA contracting officers, seeking payment on forty-five invoices that it had submitted for purportedly cancelled flights. Appellant's Statement of Undisputed Material Facts (7427(6801)-REM, 7428(6543)-REM) ¶ 627; Exhibit 57 at 0249. In June 2019, CSI appealed the deemed denial of its claim by GSA. This appeal was docketed as CBCA 6543. In April 2020, CSI appealed the deemed denial of its claim by ICE. Following remand from the Federal Circuit, these claims are now docketed as CBCA 7427(6801)-REM and 7428(6543)-REM.

Discussion

I. CSI's Terms and Conditions Are Part of the Schedule Contract

Our analysis begins with the Federal Circuit's mandate in six of the appeals. *CSI Aviation, Inc.*, 31 F.4th at 1349. The Federal Circuit held that the schedule contract incorporated CSI's terms and conditions by reference. *Id.* at 1357. The holding is based upon the finding that the schedule contract "through the incorporated [o]ffer, unambiguously identifie[d] the CSI [t]erms and [c]onditions and specifies that such terms and conditions will apply to all operations." *Id.* The Federal Circuit remanded the cases back to the Board with the guidance that the Board could consider other arguments as to why the terms and conditions were inapplicable:

[W]e do not foreclose the possibility of finding the CSI Terms and Conditions inapplicable for some other reason or that the cancellation provision is inconsistent with other provisions in the contract such as the Termination

Clause, but we leave any such possibility for the parties to raise and the Board to decide on remand.

*Id.*¹²

ICE and GSA argue that the Board should deem CSI's terms and conditions void because they contain numerous unenforceable terms and lack information that renders the terms ambiguous. ICE and GSA identify four unenforceable terms and their reasoning for such: 1) a provision decreeing that disputes will be decided by courts located in New Mexico, which is contrary to the Contract Disputes Act (CDA), 41 U.S.C. §§ 7101-7109 (2018); 2) a provision that requires the Government to indemnify and hold CSI harmless for any breach, which would run afoul of the Anti-Deficiency Act; 3) a provision that provides CSI the unilateral right to terminate, which is contrary to the requirements of the CDA; and 4) a provision that grants CSI attorney fees and costs in case of a breach by the Government, which ignores the requirements of the Equal Access to Justice Act (EAJA), 5 U.S.C. § 504. ICE and GSA also complain that the terms and conditions refer to missing pages, which requires the Board "to guess what additional fill-in information may or may not be on" the missing pages. *E.g.*, Respondents' Motion for Summary Judgment (CBCA 7425(6581)-REM, 7426(6582)-REM) at 48. ICE and GSA are particularly troubled by the fact that the cancellation provision at issue in CBCA 7423(6292)-REM, 7424(6386)-REM, 7427(6801)-REM, and 7428(6543)-REM references a cancellation charge on page one that does not exist. Because of these provisions and missing terms, ICE and GSA assert, without citation to legal authority, that "the Board cannot excise the numerous illegal and ambiguous provisions and end up with anything remotely cognizable as the agreement that the parties allegedly entered." *Id.*

CSI responds that the Federal Circuit ruled that the terms and conditions were part of the schedule contract, and, pursuant to the principles of the "law of the case," the Board is bound to implement that ruling. CSI contends that the Federal Circuit's ruling permits the Government to argue about why the particular clauses at issue may or may not be applicable, but GSA and ICE may not challenge the inclusion of the terms and conditions themselves. CSI points to places in the Government's brief to the Federal Circuit and during argument before the Federal Circuit in which the Department of Justice raised these issues regarding unenforceable provisions and missing pages. Having presented these arguments to the Federal Circuit and lost on appeal, GSA and ICE, CSI argues, cannot raise these issues again.

¹² The terms and conditions that the Federal Circuit found were incorporated by reference are the 2009 terms and conditions that we analyze in this decision.

Pursuant to the “law of the case” doctrine, “the Board is required to strictly carry out the [Federal Circuit’s] directives.” *Beacon Oil Co.*, EBCA C-9602189-R, 97-1 BCA ¶ 28,834, at 143,847. “The doctrine applies not only to issues discussed and decided by the appellate court, but also those issues decided by necessary implication.” *Id.* (citing *W.L. Gore & Associates v. Garlock, Inc.*, 842 F.2d 1275, 1278 (Fed. Cir. 1988)). Even if the Federal Circuit did not rule on the issues raised by GSA and ICE, the Board cannot consider them if the issues were “considered and resolved.” *Id.*

We do not find that respondents’ arguments are foreclosed by the law of the case doctrine. While the Government raised many of these same issues to the Federal Circuit, the arguments are not the basis for the Court’s decision, which focused on whether the terms and conditions were incorporated by reference. Further, the mandate permits the parties to raise issues as to whether the “CSI Terms and Conditions [are] inapplicable for some other reason.” *CSI Aviation*, 31 F.4th at 1357. This direction suggests that the Board can consider respondents’ arguments as to why the entirety of the terms and conditions should be disregarded, rather than just arguments as to the applicability of specific terms, as CSI argues.

However, ICE and GSA do not prevail with their arguments. CSI’s terms and conditions are the terms and conditions that CSI applies to its contracts with private charterers. As recognized by a rule implemented by GSA, “[s]tandard commercial supplier agreements contain terms and conditions that make sense when the purchaser is a private party but are inappropriate when the purchaser is the Federal Government.” GSAR, 83 Fed. Reg. 7631 (Feb. 22, 2018) (to be codified at 48 CFR 502, 512, 513, 532, 552). The rule was promulgated to “[e]xplicitly address[] common unenforceable terms [and] eliminate[] the need for negotiation on these identified terms.” *Id.* Pursuant to the FAR deviation, these provisions simply are stricken from the contract. *Id.* at 7634. In the proposed rule, GSA suggested that “[t]his approach will decrease the time needed for legal review prior to contract formation and will significantly reduce costs to both the Government and contractors.” GSAR, 81 Fed. Reg. 34,302-303 (May 31, 2016) (to be codified at 48 CFR 502, 512, 513, 532, 552). CSI’s schedule contract anticipated this issue, with the requirement that CSI would provide a copy of its pricelist and terms and conditions to any agency that requested it, after having blacked out any terms or conditions not accepted by the Government. Unfortunately, the contracting officer did not obtain the necessary legal review prior to contract formation that likely would have eliminated the provisions that GSA and ICE now find troubling. So, we are left to determine the effect, if any, of the presence of these provisions on the application of CSI’s terms and conditions.

First, we note that it was the GSA contracting officer’s responsibility to obtain review of these provisions, contrary to the suggestion made by GSA and ICE that the contracting

officer could simply rely upon CSI's purported representation that such review was not necessary. Respondents' Motion for Summary Judgment (CBCA 7423(6292)-REM, 7424(6386)-REM) at 47 n.7. Ensuring that the terms and conditions of schedule contracts are "relevant and FAR compliant" is a responsibility assigned to the GSA schedule contracting officer. *GSA Multiple Award Schedule Ordering Guide, Quick Reference*, Summer 2020, at 2. The GSA contracting officer was charged with determining whether the terms and conditions required negotiation and legal review. However, we do not construe the GSA contracting officer's failure to obtain this review as a waiver of these provisions because courts cannot "estop the Government from denying their validity." *Urban Data Systems, Inc. v. United States*, 699 F.2d 1147, 1154 (Fed. Cir. 1983); see *National Gypsum Co.*, ASBCA 53259, et al., 03-1 BCA ¶ 32,054, at 158,455 (2002) ("Government is not estopped by the representations or assurances of its agents, whether intentional or unintentional, that have the effect of nullifying a statutory requirement or are contrary to an express authority limitation affecting payment of money from the Treasury.").

In *DMS Imaging, Inc. v. United States*, 115 Fed. Cl. 794 (2014), the agency challenged the applicability of a contractor's terms and conditions because those terms included an unenforceable indemnification clause. The court denied the challenge because the terms and conditions included a severability clause, and while indemnification clauses are not enforceable against the Government, the contractor's claim was not based upon the indemnification clause. *Id.* at 799. Although only the 2014 version of CSI's terms and conditions had a severability provision, "[a] court may sever the illegal portion of the agreement and enforce the remainder . . . if the illegal provision is not central to the parties' agreement." 8 Samuel Williston & Richard A. Lord, *Williston on Contracts* § 19:70 (4th ed. 2010, Supp. May 2022).

GSA and ICE do not argue that these provisions are contrary to any rights that they must assert to defend against the claims. Instead, GSA and ICE want to throw out the terms and conditions because they include provisions that are contrary to applicable statutes. CSI does not rely upon these provisions in presenting its claims. Instead, CSI submitted claims to the cognizant contracting officers and appealed those decisions to the Board, clearly acting within the confines of the CDA rather than pursuant to the provision stating that disputes would be resolved in New Mexico courts. Moreover, the CDA provides the exclusive remedy for all contract disputes that fall within its scope. 41 U.S.C. § 7102 ("Unless otherwise specifically provided in this chapter, this chapter applies to any express or implied contract . . . made by an executive agency."). Similarly, CSI did not include in its claims the costs of pursuing these claims, which it would have to do if it thought it was entitled to fees and costs pursuant to the attorney's fees provision, rather than EAJA. Finally, by operation of the Anti-Deficiency Act, the indemnification provision is unenforceable. *Union Pacific Railroad Corp. v. United States*, 52 Fed. Cl. 730, 734 (2002). Since none of the provisions

identified by GSA and ICE go to the heart of the parties' bargain and current GSA regulation would sever these provisions, it is not appropriate to toss the entirety of the terms and conditions based upon the presence of these provisions.

We are also mindful of the Federal Circuit's guidance in *American Telephone & Telegraph Co. v. United States* (AT&T), 177 F.3d 1368 (Fed. Cir. 1999):

Invalidation of the contract is not a necessary consequence when a statute or regulation has been contravened, but 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. In *United States v. Mississippi Valley Generating Co.*, 364 U.S. 520 (1961), the Court explained that when a statute "does not specifically provide for the invalidation of contracts which are made in violation of [its provisions]" the court shall inquire "whether the sanction of nonenforcement is consistent with and essential to effectuating the public policy embodied in [the statute]." *Id.* at 563.

177 F.3d at 1374 (quoting *Mississippi Valley*, 364 U.S. at 563). In *AT&T*, the statute at issue required the Department of Defense to analyze and report to Congress about fixed-price contracts above a certain dollar threshold. After five years of performance, AT&T challenged the validity of the contract because the statutory requirements had not been followed in the award of its contract. The Federal Circuit agreed that the statute applied to the contract but described the agency's failure to follow it as "governmental noncompliance with internal review and reporting procedures." *Id.* at 1376. Cautioning that "[t]he invalidation of a contract after it has been fully performed is not favored," *id.* at 1375, the Court reversed the lower court's determination that the contract was *void ab initio* for failure to comply. *See also John Reiner & Co. v. United States*, 325 F.2d 438, 440 (Ct. Cl. 1963) ("the court should ordinarily impose the binding stamp of nullity only when the illegality is plain."). Here, too, we have a completed contract. Given that the statutes that these provisions purportedly violate provide adequate protection against their use in claims against the Government, we find that ICE and GSA have not provided a basis to strike CSI's terms and conditions in their entirety.

Regarding the absence of pages and references to missing information, we do not see how this missing information affects the interpretation of the contract. For example, the cancellation provision at issue in CSI's cancellation claim references a cancellation charge on the first page of the agreement, which is missing. However, the clause also defines the cancellation charges that apply in the absence of a cancellation charge on the first page of the agreement. Without a specific example of how these missing pages or information leaves

the Board without the ability to interpret the agreement, we decline to strike CSI's terms and conditions on this basis.

II. CSI's Terms and Conditions Take Precedence Over Other Provisions of the Commercial Items Clause

ICE and GSA also seek to revisit the Board's prior ruling on how the terms and conditions were incorporated into the schedule contract, a determination that is relevant for the application of the Order of Precedence clause, FAR 52.212-4(s). The Board previously held that the "commercial price list expressly incorporated in the schedule contract would take precedence, in the event of a conflict, over the termination for convenience provision in the Commercial Terms and Conditions – Commercial Items clause." *CSI Aviation, Inc. v. General Services Administration*, CBCA 6543, 20-1 BCA ¶ 37,580, at 182,481. This holding was based upon the determination that the "schedule of supplies/services" and "addenda" take precedence over other provisions of the clause itself. *Id.* ICE and GSA argue that the Board's prior determination was somehow invalidated by the Federal Circuit's holding that the terms and conditions were incorporated through CSI's offer, rather than the commercial price list. *E.g.*, Respondents' Motion for Summary Judgment (CBCA 7425(6581)-REM, 7426(6582)-REM) at 33 n.8. However, the Federal Circuit found that CSI's terms and conditions were referenced as part of CSI's pricing and its pricing policy. *CSI Aviation*, 31 F.4th at 1355. These documents all became part of the contract. *Id.* Therefore, the Federal Circuit's ruling did not disturb the Board's previous decision regarding the precedence of the commercial price list over the termination for convenience provision.

The Board did not decide whether CSI's terms and conditions were part of the schedule, the first item in the Order of Precedence clause, or an addendum to the schedule, the fourth item in the Order of Precedence clause. *CSI Aviation*, 20-1 BCA at 182,481. In either case, CSI's terms and conditions would take precedence over other provisions of FAR 52.212-4 to resolve the conflict between terms perceived by GSA and ICE. As explained below, we currently do not find a conflict between CSI's terms and conditions and other terms of the schedule contract, so we need not consider this issue further at this time.

III. Cancellation and Rounded-Up Hours Clauses Are Operative Parts of the Schedule Contract

A. Cancellation Provision Does Not Conflict with Termination Provision of Commercial Items Clause

We turn now to the contract interpretation issues presented in the parties' motions. In CBCA 7427(6801)-REM and 7428(6543)-REM, CSI seeks payment for more than 600 flights that it contends were cancelled by ICE within fourteen days of the scheduled flight. By operation of the cancellation provision in its terms and conditions in the schedule contract, CSI asserts that it is entitled to payment of the amounts it would have received for flying these flights. GSA and ICE assert that CSI's cancellation provision conflicts with the termination for convenience provision in the Commercial Items clause which would apply to any flight cancellations.

CSI's terms and conditions provide for payment of a 100% cancellation charge in the event of cancellation with less than fourteen days' notice. The solicitation issued by GSA envisioned that offerors would propose cancellation provisions, providing only that the provision must be the same as that provided to commercial customers. There is no dispute that this term is the same cancellation term for its commercial customers. "An interpretation which gives reasonable meaning to all parts of an instrument will be preferred to one which leaves a portion of it useless, inexplicable, inoperative, void, insignificant, meaningless or superfluous; nor should any provision be construed as being in conflict with another unless no other reasonable interpretation is possible." *Hol-Gar Manufacturing Corp. v. United States*, 351 F.2d 972, 979 (Ct. Cl. 1965). We follow this rule of contract interpretation and find that the cancellation provision must be given effect.

GSA and ICE argue that the termination for convenience provision of the Commercial Items clause governs the cancellation of flights and that, because these provisions are in conflict, the Board should follow the Order of Precedence clause and find that the termination for convenience provision takes precedence over the Cancellation clause. "Where specific and general terms in a contract are in conflict, those which relate to a particular matter control over the more general language." *Hills Materials Co. v. Rice*, 982 F.2d 514, 517 (Fed. Cir. 1992) (citing *Hol-Gar Manufacturing*, 351 F.2d at 980). We follow that contract interpretation rule here. CSI's cancellation term governs the cancellation of specific flights, whereas the termination for convenience provision provides the agency with the ability to terminate all or part of the task order itself. This interpretation is reinforced by the provision in the schedule contract that permitted ordering agencies to employ the termination provisions of FAR 52.212-4 to terminate task orders. Because we find no conflict between these provisions, we need not consider the order of precedence.

We highlight a potential conflict, not raised by the parties in their briefs, but implicated by ICE's response to CSI's proposed findings regarding the flights that were cancelled. The schedule contract provides that the delivery schedule shall be determined by agency task order. ICE's task order provides that, for at least some of the flights, ICE could provide CSI its schedule twenty-four hours before departure. ICE relies upon this provision to assert that although flights were "cancelled" less than fourteen days from scheduled departure, many of these flights were not scheduled or were changed in accordance with the ICE task order provision. If ICE's scheduling provisions allowed for these cancellations and changes within the fourteen-day window prior to the scheduled flight, the provision in the schedule contract that dictates that CSI shall follow the agencies' requirements for scheduling would be in conflict with CSI's cancellation provision, which requires the payment of a cancellation charge if a flight is cancelled within fourteen days. Because the parties have not raised this issue, we do not resolve this conflict here. Instead, we will reach this issue, if necessary, when deciding which flights were cancelled and subject to the cancellation fee.

B. Rounding Up Provision Does Not Conflict with Payment Provision of Schedule Contract

In CBCA 7425(6581)-REM and 7426(6582)-REM, CSI seeks payments for additional flight time, asserting that it is entitled to be paid for the rounded hours on all of its flights pursuant to the rounding up provision in its terms and conditions. CSI's terms and conditions state that "estimated or actual block hours, if applicable, will be rounded up to the nearest hour." The language is clear and requires that any flight time be rounded to the nearest hour.

ICE and GSA contend that either the term "actual" in the payment provision in the schedule contract is ambiguous or that the term "actual" conflicts with the rounding up provision. The schedule contract payment provision directs the contractor to provide a should-cost estimate in advance of the flight and a final invoice based upon hours flown:

Task Orders for this contract will be firm fixed priced. Contractor agrees to provide a should-cost estimate for each task order with all knowable costs itemized before flight. The final invoice should include all actual block hour and auxiliary service charges that apply to the task order requirements. The Contractor shall explain any/all differences between the pre-flight should cost estimate and post-flight invoiced costs to the ordering agency.

The term "actual" is clear and stands in contrast to the use of the term "estimate" in the prior sentence. We find no ambiguity. We also find no conflict. The payment provision requires payment for "actual hours" instead of "estimated hours." The schedule contract does not

mention minutes or payment for flight hours, and we do not read into the term “actual” a limitation that CSI may only bill for the actual hours and minutes that it flew, as advocated by ICE and GSA. By interpreting the payment provision in this manner, we reconcile all the terms of the contract, including CSI’s rounding provision. *See Hol-Gar Manufacturing*, 351 F.2d at 979.

ICE and GSA also argue that CSI’s claim for its rounded hours conflicts with its obligations under the Price Reduction clause of the schedule contract. The Price Reduction clause permits the Government to obtain the benefit of any price reductions that a schedule contractor may offer to its commercial customers. As support, ICE and GSA cite to one exhibit provided to the GSA contracting officer in 2015 that purports to show that CSI was not rounding its hours for its commercial customers. Exhibit 191 at 8612-15. ICE and GSA have proffered no findings of fact on this contention. Because ICE and GSA have not established the factual predicate for the argument – that CSI was not rounding up for its commercial customers – we will not consider the argument.¹³

IV. Disputed Issues Preclude the Grant of Summary Judgment

A. Further Proceedings Are Necessary to Determine Whether CSI Waived Application of Its Rounding Up Provision

As noted at the beginning of this decision, we are able to resolve the issues of contract interpretation presented by the parties’ motions. However, factual disputes remain that preclude entry of judgment for either party. We look first to the claims that are tied to the contract interpretation questions that we just answered.

“[S]ummary judgment in favor of either party is not proper if disputes remain as to material facts.” *Mingus Constructors, Inc. v. United States*, 812 F.2d 1387, 1391 (Fed. Cir. 1987). “Genuine disputes of material fact exist when a rational finder of fact could resolve an issue in favor of either party and the resolution of that issue would impact the outcome of the case under governing law.” *Ben Holtz Consulting, Inc. v. Department of Agriculture*, CBCA 7637, 23-1 BCA ¶ 38,463, at 186,946. “The moving party bears the burden of establishing the absence of any genuine issue of material fact and all significant doubt over factual issues must be resolved in favor of the party opposing summary judgment.” *Mingus Constructors*, 812 F.2d at 1390.

¹³ CSI objects that the Government’s argument constitutes a government claim that must be the subject of a contracting officer’s decision before the Board has jurisdiction to consider it. Because we find that ICE and GSA’s argument is without factual support, we do not reach CSI’s argument regarding jurisdiction.

The first dispute of material fact is whether CSI waived application of its rounding up provision.¹⁴ Waiver is an “intentional relinquishment or abandonment of a known right.” *Cindy Karp v. General Services Administration*, CBCA 1346, 11-1 BCA ¶ 34,716, at 170,936 (quoting *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938)). ICE and GSA bear the burden to prove waiver, *id.*, and must show prejudice resulting from CSI’s delayed enforcement of the provision. *Transworld Systems, Inc. v. Department of Education*, CBCA 6049, 22-1 BCA ¶ 37,994, at 184,514 (2021). ICE and GSA assert that CSI waived application of its rounding provisions by agreeing to the invoicing provisions when it submitted a proposal in response to ICE’s request for quotations and not asserting entitlement to payment pursuant to these provisions during contract performance.

There was a conflict between the CSI rounding provision in the schedule contract and the invoicing provision of the ICE statement of work. In its proposal, CSI agreed to abide by the invoicing and reporting requirements of the statement of work. While the rounding provision allows CSI to round flight hours up to the nearest hour, the invoicing provision states that CSI will only be paid for hours and minutes flown and there will be no rounding of hours. If this issue were one of strictly contract interpretation, by operation of FAR 52.216-18, which provides that the terms of the schedule contract will take precedence over any conflicting terms of the task order, CSI would prevail. However, the schedule contract regulations permit agencies to obtain better terms than those in the schedule contract. FAR 8.404(d) (“Although GSA has already negotiated fair and reasonable pricing, ordering activities may seek additional discounts before placing an order.”).¹⁵ The “application of the order of precedence clause is only necessary if there is a conflict in the contract’s terms; the proper interpretation of this contract (which permits the parties to mutually agree to lower prices in the [delivery orders] than the original schedule) avoids such a conflict.” *Relyant, LLC*, ASBCA 58172, 16-1 BCA ¶ 36,228, at 176,749. Finding that CSI agreed to abide by ICE’s invoicing terms would allow us to reconcile the terms of the contract and avoid a conflict.

CSI asserts that its statement that it would abide by the statement of work invoicing provisions in its proposal constitutes irrelevant extrinsic evidence but does not provide an explanation of what it was offering with this language. CSI also contends that it did not waive its rounding provision because it repeatedly informed GSA that its terms and

¹⁴ ICE pled waiver as an affirmative defense in its answer in CBCA 6581, which is now CBCA 7425(6581)-REM following remand. Respondents’ Answer ¶ 58.

¹⁵ This provision also answers CSI’s contention that GSA would have to be party to any agreement to change the terms of the schedule contract. As noted, GSA regulations permit agencies to negotiate better terms.

conditions would apply to all operations. However, this explanation does not answer whether CSI chose not to enforce specific provisions when it submitted proposals to obtain the task orders.

CSI also failed to alert ICE to its claim regarding rounded hours for all of the years of the contract performance and billed for flights in accordance with the invoicing provision. Moreover, CSI was required to provide summary reports that identified the funding amounts left on the task orders. Presumably, CSI provided these reports, but the record does not indicate whether these reports reflected the additional amounts owed due to application of the rounding provision. CSI chose to wait for contract closeout to seek payment for these additional hours. “A delay in asserting rights which prejudices the other party by running up recoverable costs may be considered a waiver of that right.” *Swinging Hoedads*, AGBCA 85-308-3, 86-3 BCA ¶ 19,135, at 96,725 (citing *Foster Wheeler Corp. v. United States*, 513 F.2d 588 (Ct. Cl. 1975); *Ling-Tempeco-Vought, Inc. v. United States*, 475 F.2d 630 (Ct. Cl. 1973)). CSI argues that the timing of its claim does not matter because the schedule contract allows for the submission of a final invoice. This argument may be a sufficient explanation for CSI’s failure to assert its rights to payment for cancellation. But, the payment provisions required submission of periodic invoices, which CSI submitted, with hours billed, not rounded up. It remains to be decided whether the silence on these invoices constitutes waiver.

There is no evidence in the record that CSI voiced any objection to ICE’s direction or that it asserted that it was permitted to round to the nearest hour based upon its terms and conditions. Silence has been construed as a waiver. *E. Walters & Co. v. United States*, 576 F.2d 362, 367 (Ct. Cl. 1976). In *Walters*, the contracting officer exercised an option at an incorrect price and the contractor waited until contract performance was complete to assert a claim for the difference in price. The court upheld the Armed Services Board of Contract Appeals’ determination of waiver, in part, because the contractor’s actions foreclosed the pursuit of other alternatives by the agency. *Id.* at 368.

CSI explains that its silence and agreement to abide by the terms of the ICE invoicing provision during contract performance were the product of duress. CSI alleges that ICE threatened to withhold payment if the invoices were not in accordance with the invoicing provision. ICE disputes this assertion and asserts that there is no evidence in the record to support the assertion. As support, CSI cites to its interrogatory response, which is sufficient evidence to defeat a motion for summary judgment. *Brown v. White’s Ferry, Inc.*, 280 F.R.D. 238, 243 (D. Md. 2012). The basis for this interrogatory response and whether it is sufficient to overcome waiver will be explored in further proceedings.

GSA and ICE also urge us to find that CSI's agreement to abide by the terms of the invoicing provision and refund the amounts billed for rounding to the tenths of an hour during contract performance constitutes accord and satisfaction. The facts do not support such a finding. One of the required elements to find accord and satisfaction is the exchange of consideration. *O'Connor v. United States*, 308 F.3d 1233, 1240 (Fed. Cir. 2002). "[T]o constitute consideration, a performance or a return promise must be bargained for." *Transworld Systems*, 22-1 BCA at 184,506. CSI purportedly agreed to abide by ICE's interpretation of the invoicing provision, but ICE and GSA have provided no evidence that CSI received consideration for this agreement.

We deny CSI's motion in CBCA 7425(6581)-REM and 7426(6582)-REM because GSA and ICE have made a plausible showing of waiver. We deny GSA and ICE's motion because CSI has raised allegations of duress. The Board will conduct further proceedings on the issue of whether CSI waived application of its rounding provision.

B. CSI Has Failed to Meet Its Burden to Prove Quantum on Its Rounding-Up Claim

We also deny CSI's motion for summary judgment in CBCA 7425(6581)-REM and 7426(6582)-REM because CSI has failed to meet its burden to prove that the amount that it seeks has been correctly calculated. "The claimant bears the burden of proving the fact of loss with certainty, as well as the burden of proving the amount of loss with sufficient certainty so that the determination of the amount of damages will be more than mere speculation." *Willems Industries, Inc. v. United States*, 295 F.2d 822, 831 (Ct. Cl. 1961). Here, CSI provides only its revised invoices, seeking payment between the amount of the original invoices and the rounded hours. CSI fails to establish that the hours have been calculated correctly or provide any other explanation of its claim to satisfy its burden to show that the amount is correct. It may be a simple explanation, but one that CSI must provide if it wants to recover the amounts it seeks.¹⁶

¹⁶ ICE objects to CSI's proof of damages, in part, because certain invoices were not provided to the contracting officer and, therefore, ICE alleges that CSI failed to meet the sum certain requirement. The sum certain requirement ensures that the contracting officer is put on notice as to the nature and the amount of the contractor's claim. *Contract Cleaning Maintenance, Inc. v. United States*, 811 F.2d 586, 592 (Fed. Cir. 1987). The amount claimed can change after the matter is appealed to the Board, as long as the new amount is still based upon the same operative facts presented to the contracting officer. *Bick-Com Corp., ASBCA 24782, et al.*, 84-1 BCA ¶ 16,957, at 84,322 ("revision of the amount claimed and/or proof of a greater amount is permitted without further certification"). The difference in amounts presented to the contracting officer and the Board is not the basis of our determination that

C. Further Proceedings Are Necessary to Determine if CSI Waived Application of Its Cancellation Provision and Which Flights Were Cancelled

ICE and GSA also assert that CSI has waived its cancellation provision.¹⁷ Unlike the rounding provision, we do not find a direct conflict between the cancellation provision and other terms of the schedule contract or task order. However, the cancellation provision and the scheduling requirements in the statement of work may conflict because one penalized ICE for cancellations within fourteen days and the other permitted changes up to twenty-four hours in advance. As noted, this conflict has not been briefed by the parties, requiring us to defer a decision until we conduct further proceedings. CSI did not bill for a flight cancellation until January 2018, after the flight at issue in CBCA 7423(6292)-REM and 7424(6386)-REM, although it now seeks payment for a flight purportedly cancelled as early as April 2014. As CSI points out, neither the payment provision of the schedule contract nor the invoicing provisions of the task order address how to invoice for cancelled flights. But, as ICE alleges, CSI's failure to raise the issue earlier caused ICE to incur charges on the contract that it might otherwise have avoided. *See Swinging Hoedads*, 86-3 BCA at 96,725.

There are also myriad disputes concerning which flights were cancelled. CSI contends that it is entitled to payment for more than 600 cancelled flights, 359 flights that ICE agrees were scheduled then "directed not to occur" with less than fourteen days' notice. ICE contends that these cancellations were permitted within the scheduling mechanism set forth in the ICE statement of work. CSI has proffered findings on approximately 250 additional flights, which ICE asserts were cancelled for reasons beyond the agency's control. ICE asserts that several of these cancellations were the result of actions by foreign governments, but the parties have not addressed the fact that the ICE statement of work and CSI's terms and conditions both placed the burden of working with foreign governments on ICE. CSI's terms and conditions contain a provision that allows ICE to change or reschedule flights. It is not clear which of the flights that CSI contends were "cancelled" were rescheduled flights. Although ICE asserts that schedules remained fluid and the subject of negotiation, the record is silent as to whether CSI approved any of the schedule changes as required by the change provision of its terms and conditions. Given these disputes, we

CSI has not met its burden to prove quantum.

¹⁷ CSI designated its notice of appeal as its complaint. The Board designated the September 3, 2019, contracting officer's decision as the answer to the complaint. Board's Order Designating Answer (Mar. 10, 2020). In the September 3, 2019, decision, the GSA contracting officer alleged facts sufficient to put CSI on notice of an affirmative defense of waiver. Exhibit 58 at 180-81.

cannot decide the appeals on the current record. We will conduct further proceedings to determine which flights were cancelled and subject to the payment of the cancellation fee.

V. ICE's Cancellation or Postponement of the Flight is Not Excused by the Sovereign Acts Doctrine

In CBCA 7423(6292)-REM and 7424(6386)-REM, ICE argues that its cancellation or postponement of the flight because of the district court injunction should be excused pursuant to the sovereign acts doctrine. This defense is unavailing because the district court injunction is not a sovereign act.

“The sovereign acts doctrine is designed to balance ‘the government’s need for freedom to legislate with its obligation to honor its contracts.’” *Klamath Irrigation District v. United States*, 635 F.3d 505, 520 (Fed. Cir. 2011) (quoting *United States v. Winstar Corp.*, 518 U.S. 839, 895-96 (1996)). A sovereign act is defined as “[w]hatever acts the government may do, be they legislative or executive, so long as they be public and general.” *Horowitz v. United States*, 267 U.S. 458, 461 (1925). “A court acts in a judicial capacity, not a legislative or executive capacity, taking a court order out of the sovereign acts doctrine.” *Yates-Desbuild Joint Venture v. Department of State*, CBCA 3350, et al., 17-1 BCA ¶ 36,870, at 179,700 (citing *Superior Timber Co.*, IBCA 3459, 97-1 BCA ¶ 28,736, at 143,431 (1996)). Thus, the sovereign acts doctrine does not provide a defense to ICE’s direction to CSI to not conduct the flight. We will explore in further proceedings whether the flight was cancelled or postponed and rescheduled.

VI. Further Proceedings Are Necessary to Determine Whether CSI’s Failure to Continue Flight is Excused

In CBCA 6385 and 6487, we are required to decide whether CSI’s failure to have a flight crew available is excused pursuant to the Excusable Delay clause in either CSI’s terms and conditions or the Commercial Items clause. If the failure is excused, ICE’s demand for costs pursuant to the Liquidated Damages clause must give way, and CSI is entitled to be paid for the costs of the flight that it did complete.

A. CSI’s Clause is the Operative Term

Both CSI’s terms and conditions and FAR clause 52.212-4 include an excusable delay provision. The parties assert that the Board does not need to determine which clause governs because both clauses require the cause of the delay to be “beyond [CSI’s] control” or “beyond . . . [CSI’s] reasonable control.” Respondents’ Opposition to Appellant’s Motion for Summary Judgment (CBCA 6385, 6487) at 10-11; Appellant’s Opposition to

Respondents' Motion for Summary Judgment (CBCA 6385, 6487) at 2-3.¹⁸ Based upon our prior determination that CSI's terms and conditions take precedence over other provisions of FAR clause 52.212-4, we will follow the language of CSI's excusable delay clause and determine whether the lack of crew rest resulting from the power outage was "beyond CSI's control."

B. Neither Party Makes the Required Showing to Resolve the Claim on Summary Judgment

ICE bears the burden of establishing that liquidated damages "are due and owing." *Weddle Plumbing & Heating Co.*, VABCA 2209, 85-3 BCA ¶ 18,424, at 92,506. ICE asserts liquidated damages for the cancellation of the flight due to the unavailability of the crew in the amount that it would have paid CSI for the flight to be completed. It is undisputed that the crew was unavailable at the scheduled time and the amount asserted is what ICE would have paid CSI. ICE has met its burden on its claim for liquidated damages.

We look to CSI to establish that the cause of its inability to continue the flight should be excused. *Sauer Inc. v. Danzig*, 224 F.3d 1340, 1347 (Fed. Cir. 2000). For its failure to perform to be excused, CSI must establish "that its performance was in fact delayed by the causes alleged, must show that it took every reasonable precaution to avoid foreseeable causes for delay and to minimize their effect, and must establish the precise period of time that such causes actually delayed performance." *Ace Electronics Associates, Inc.*, ASBCA 13899, 69-2 BCA ¶ 7922, at 36,845. CSI "must do more than make a bare assertion concerning the causes for its delay." *Id.*

We cannot resolve this dispute on summary judgment because, while both parties provide enough evidence to forestall the granting of summary judgment for the other party, neither provides undisputed, clear evidence sufficient for the grant of summary judgment. It is undisputed that there was a power outage and that the crew was unable to get its required rest. It is further undisputed that the replacement crew, when finally rested, was not able to fly the flight because the Somali government would not extend the period to accept the flight.

¹⁸ Upon first review, CSI's clause seems to suggest that "regulation" without any determination of whether the cause was within CSI's control could exculpate CSI. We attribute this interpretation to the poor placement of commas in the provision. The purpose of an excusable delay clause is "to protect the contractor against the unexpected." *United States v. Brooks-Callaway Co.*, 318 U.S. 120, 122 (1943). Because the FAA regulations under which CSI and its airline partners operate are known, regulations by themselves cannot excuse performance. Accordingly, CSI still must show that the cause of delay is beyond its control.

What has not been established is whether CSI did everything within its control to ensure that the crew obtained its rest. The declaration of its chief executive officer that CSI did not anticipate any difficulties in scheduling only one crew and that it had not experienced similar problems before does not answer the question of what CSI did to anticipate the difficulties that it encountered. These general statements of its CEO stand in contrast to CSI's promises in its proposal that it was experienced in flight scheduling and would do everything necessary to prevent flight delays, including staging the necessary crews. The statements of the chief executive officer are sufficient to forestall the granting of summary judgment for ICE but do not carry CSI's burden to affirmatively prove that the causes were "beyond its control."

ICE's arguments are similarly insufficient. ICE offers no proposed facts, but asserts in its brief that the power outages were a common occurrence in Senegal, a fact that CSI would have known with some easy research. As support, ICE cites a 2012 country report on Senegal prepared by the Department of State and two news reports. Respondents' Opposition to Appellant's Motion for Summary Judgment (CBCA 6385, 6487) at 13. None of the documents cited were included in the appeal file. The Department of State country report focuses upon the human rights practices in the country and only appears to mention power outages in connection with reported, but unrelated, criminal activity that was not prosecuted. One news report describes riots that occurred during an unexpectedly long power outage in 2011 and the other described Senegal's plan to turn sewage into a fuel source in 2015. None of the cited sources provide an undisputed picture of pervasive power outages that should have been known to CSI.

ICE also asserts that CSI should have placed its crew at a hotel with a backup generator, staged the crew in a different location, or staged additional crews in anticipation of the potential outage. Despite having taken discovery, ICE fails to cite to any facts or testimony to support its supposition that CSI should or could have undertaken these efforts. Moreover, as noted, the ICE statement of work directs that flights are to be conducted with as few crew members as possible and that the costs of staging additional crew members can be invoiced only with the prior approval of the contracting officer's representative. Given these limitations, we will not find that CSI should have scheduled additional crews at an additional expense when there has been no showing that the contracting officer's representative would have approved these expenses despite the contractual limitation. *See Southern Flooring & Insulating Co.*, GSBKA 1360, 1964 BCA ¶ 4480, at 21,538 (finding that the contractor was not required to incur costs to hire a second crew to make up weather delays where the contract specifically required the crew to be experienced in specific installation).

Given this record, we are left to conduct further proceedings to determine whether CSI "took all reasonable action to perform the contract notwithstanding the occurrence of the

excuse.” *Jennie-O Foods, Inc. v. United States*, 580 F.2d 400, 408 (Ct. Cl. 1978) (citing *Brooks-Callaway Co.*, 318 U.S. at 122).

Decision

The parties’ motions for summary judgment are **DENIED**. The Board will issue a separate order to schedule further proceedings.

Marian E. Sullivan
MARIAN E. SULLIVAN
Board Judge

I concur:

Allan H. Goodman
ALLAN H. GOODMAN
Board Judge

VERGILIO, Board Judge, writing separately.

As the other two panel members agree on the result, and to keep the cases progressing to resolution, my views here are not determinative. There remain factual and legal issues to be resolved. The parties have overly complicated the cases. There is a schedule contract and task orders thereunder. CSI entered into the task orders, in response to ICE requests for quotations. ICE ordered and/or obtained flights under the task order contracts. CSI’s cases largely are predicated upon its commercial contract clauses, seemingly those existing at the time of each task order. However, it appears that, in contracting for the task orders, CSI accepted the terms and conditions specified in the requests for quotations and resulting task orders. The parties should focus on this to help resolve these disputes. The focus should be specific to each claim/docketed case.

For example, in CBCA 7425(6581)-REM and 7426(6582)-REM, the claims relate to CSI’s rounding up flight hours. The claims appear to contravene task order language that specifies that, in billing, flight hours shall be expressed in actual hours and minutes only;

CBCA 6385, 6487, 7423(6292)-REM, 7424(6386)-REM, 7425(6581)-REM,
7426(6582)-REM, 7427(6801)-REM, 7428(6543)-REM

33

minutes shall not be rounded up or down. CSI accepted task orders with such language (without any adjustment to its schedule pricing), although different from the schedule contract/commercial contract language. The parties should address why the task order language should or should not be operative.

Joseph A. Vergilio
JOSEPH A. VERGILIO
Board Judge