UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

DENIED: October 7, 2024

CBCA 7601, 7721

COMMONWEALTH HOME HEALTH CARE, INC.,

Appellant,

v.

DEPARTMENT OF VETERANS AFFAIRS,

Respondent.

Sarah Reida of Legal Meets Practical, LLC, Alpharetta, GA, counsel for Appellant.

Neil S. Deol, Office of General Counsel, Department of Veterans Affairs, Decatur, GA, counsel for Respondent.

Before Board Judges **BEARDSLEY** (Chair), **SULLIVAN**, and **CHADWICK**.

SULLIVAN, Board Judge.

Commonwealth Home Health Care, Inc. (Commonwealth) appealed the denials of its claims on a contract with the Department of Veterans Affairs (VA) for the provision of home oxygen services. The parties have requested that the Board bifurcate the issues of liability and quantum and decide the issue of liability on the written record, pursuant to Rule 19 (48 CFR 6101.19 (2023)). Here, the Board decides the issue of liability on two questions: was VA's monthly patient estimate negligently prepared, and were option years one and two improperly exercised when the actual patient numbers fell below VA's estimate? For the reasons that follow, we answer no to these questions. We also find that, although VA exercised the second option year late, Commonwealth waived or forfeited its right to object by continuing performance. We deny the appeals.

Background

I. Prior and Related Contracts

In July 2013, Commonwealth entered into a contract with VA to provide home oxygen equipment for veterans in the North Florida/South Georgia (NFSG) Veterans Health System. Appeal File, Exhibit 34 at 880, 893-94.[1] In that contract, VA estimated that Commonwealth would serve 1850 patients monthly in the NFSG region. *Id.* at 893. Commonwealth performed this contract into 2019. Exhibit 28 at 50–51, 93. In January 2020, VA entered into an emergency contract with Commonwealth, which Commonwealth performed until June 2020. Exhibit 35 at 72, 98, 100, 102. We refer to these two contracts collectively as the predecessor contracts.

Over the course of these predecessor contracts, the number of patients served by Commonwealth increased substantially. Exhibit 28 at 69–70. Both parties calculated the monthly average number of patients served for fiscal years 2018, 2019, and the first three quarters of fiscal year 2020, but their averages do not match:

	VA's Calculation	**Commonwealth's Calculation**
Fiscal Year 2018	2920	2872
Fiscal Year 2019	2953	2940
Fiscal Year 2020	2952	2870

Exhibit 36; Appellant's Initial Brief in Support of Its Consolidated Appeals (Appellant's Initial Brief) at 19-21. We find that Commonwealth's calculations are correct. *See* Exhibits 1-3, 52-54.

In addition to the predecessor contracts, Commonwealth also has contracts with VA to provide home oxygen services in Alabama, North Carolina, Virginia, and West Virginia. Exhibit 30 at 22; Exhibit 28 at 15. VA has contracted with Commonwealth to provide home oxygen services continuously since 1996, and Commonwealth's Vice President of Business Development has been personally involved with the predecessor contracts, including reviewing the solicitations and putting together Commonwealth's offers to VA. Exhibit 28 at 9, 16.

[1] All exhibits are found in the appeal file, unless otherwise noted. The page numbers cited are the Bates numbers on the exhibits with prefixes removed.

II. The Contract

A. Relevant Terms

VA awarded the current firm-fixed-price requirements contract to Commonwealth on October 1, 2020, with a base year (October 1, 2020, to September 30, 2021) and four one-year options. Exhibit 9 at 1, 23-41, 49. The contract contains the standard Federal Acquisition Regulation (FAR) Requirements clause, 48 CFR 52.216-21 (2020) (FAR 52.216-21). *Id.* at 49-51. In both the Requirements clause and the statement of need, VA advised that it would not consider as the basis for a request for an equitable adjustment the fact that its actual orders did not meet the estimated amounts. *Id*. at 5 and 49. VA estimated the annual cost to be $3,476,760, for the base year and each of the four option years. *Id.* at 23-42. VA estimated the monthly average for the number of patients to be served would be 3100. *Id.* at 4. VA did not disclose the data used to generate the estimate.

B. Number of Patients Served

The number of patients that Commonwealth served was lower than the estimate and declined during the course of performance. Commonwealth served an average of 2606 patients per month in fiscal year 2021 and an average number of 2278 patients per month in fiscal year 2022. *See generally* Exhibits 55-56. Based upon records provided in the appeal file, the following table shows the number of patients served during the predecessor contracts and the current contracts:

	------Predecessor Contracts------			**Current Contract**	
Fiscal Year	2018	2019	2020	2021	2022
Month					
October	2816	2884	2945	2659	2537
November	2829	2877	2893	2693	2454
December	2862	2911	2885	2690	2414
January	2901	2923	2889	2685	2412
February	2898	2916	2857	2686	2371
March	2931	2954	2878	2608	2284
April	2881	2941	2831	2560	2251
May	2878	2988	2808	2570	2183
June	2866	3003	2843	2533	2128
July	2862	2950	2788	2524	2097
August	2883	2976	2769	2531	2122
September	2858	2956	2740	2538	2088

Exhibits 1-3, 21 at 3, and 52-56.

C. Preparation of Estimates by VA

In 2020, VA's contracting officer representative (COR) prepared two internal documents containing estimates relating to home oxygen use in the NFSG region. Exhibit 26 at 16. The first, an independent government cost estimate (IGCE) dated May 19, 2020, provided the total estimated cost for the base year of the contract and each option year. Exhibit 44. The cost in the base year was $4,800,000, and the cost increased by $300,000 in each of the option years, eventually reaching $6,000,000 by the fourth and final option year. *Id*. This increase represents a year-on-year cost increase of more than five percent for each year of the contract period.[2] In total, the price for the fourth and final option year was twenty-five percent higher than the price for the base year. No explanation or justification is provided in the IGCE for any of the annual costs for individual years or for the overall increase in price on an annual basis.

The second document, titled Home O2 Historical Data (undated), was generated from Commonwealth invoices provided to VA and purported to list the average number of patients served monthly between October 2018 and June 2020.[3] Exhibit 36; Exhibit 26 at 47–48. In this document, the COR showed her calculation of average monthly patients per year from quarter one of fiscal year 2018 through quarter three of fiscal year 2020. Exhibit 36. As noted above, VA incorrectly calculated these average values as 2920 for fiscal year 2018, 2953 for fiscal year 2019, and 2952 for the first three quarters of fiscal year 2020.[4] *Id.* The COR averaged these three figures to produce a "[c]alculated [t]otal [a]verage" for the thirty-three-month period of 2942. *Id*. The COR found that this average "indicated a steady population base." *Id.*

The COR testified in deposition that there was "a percentage of growth annually" that could be seen from the totals and that the growth was "[a]round five percent" over the three years in the reviewed period. Exhibit 26 at 51–52. At no point during the period analyzed was there a growth rate of five percent. The highest monthly growth rate during that period was 1.6% between April 2019 (2941 patients) and May 2019 (2988 patients). The highest quarterly growth rate during that period was 0.9% between the first quarter of fiscal year 2018 (average of 2835.7 patients) and the second quarter of fiscal year 2018 (average of 2910

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[2] The year-on-year cost differences ranged from 5.26% (comparing option year four with option year three) to 6.25% (comparing the option year one with the base year).

[3] Presumably this document was drafted between July 1 (after the June billing period) and July 10 (the date the solicitation was issued). *See also* Exhibit 26 at 46.

[4] The most significant error was the average for the first three quarters of fiscal year 2020: 2952, a number almost three percent higher than the actual average.

patients). As Commonwealth notes, the difference between any two years in the thirty-three-month period was approximately one percent. Appellant's Initial Brief at 16, 22. The COR's contemporaneous statement that the numbers "indicated a steady population base" is irreconcilable with her subsequent statement that a "percentage of growth annually" could be seen from the totals. *Compare* Exhibit 36, *with* Exhibit 26 at 51.[5]

Without explanation, the COR wrote that an "estimated monthly average of 3100 patients was calculated to allow for the possibility of growth over the course of the new contract." Exhibit 36. Even assuming that the population would grow by five percent, a monthly *average* of 3100 is still incorrect. The COR apparently reached 3100 by multiplying 2952 patients—the average for the available data for fiscal year 2020—by 1.05 to reflect a five percent increase. This multiplication results in 3099.6 patients. Because the COR wanted the estimate to reflect "the highest number of patients [she] anticipated would be seen," Exhibit 26 at 86–87, this 3100-patient target would presumably be reached at the end of the five-year contract.[6]

The problem is that a population that eventually grows to 3100 from 2952 is presumably below 3100 during most of the growth period. In order to grow from 2952 to 3100 in five years, the population would need to increase by an average of 2.5 patients per month. If the patient load had increased at this rate, the *average* monthly number of patients across each of the sixty months would be 3026, *not* 3100. In order to reach a monthly *average* of 3100 patients, the population would have needed to increase by five patients per month to reach a total patient population of 3247 by the end of the contract, a growth rate of almost ten percent over the life of the contract.

The contracting officer did not participate in the preparation of either of these documents and did not know what documents had been used to prepare them. Exhibit 25 at 17-20. The contracting officer did not discuss the creation of the Home O2 Historical Data document with the COR and could not recall whether she saw it prior to issuing the solicitation. *Id.* at 31-33. The contracting officer testified that she was not involved in the estimation process because she is "not patient care directed" and expressed disdain towards the very concept of estimates, saying that the Government "cannot project how many patients [it is] going to see" and suggesting that it would be impossible to predict how many patients

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[5] It also is difficult to reconcile why the COR—who prepared both documents within a few weeks of each other—would estimate a twenty-five percent increase in total cost for a contract with only five percent growth in estimated service requirements.

[6] This assumption is also supported by the fact that the variance in the averages between any two fiscal years was approximately one percent: applying one percent over a five-year period could lead to an estimate of five percent growth over time.

would be seen on a given day. *Id*. at 41. When asked what process she would use to review and approve such an estimate for use in contract solicitation, the contracting officer simply answered: "Trust." *Id.* at 32.

The parties dispute whether Commonwealth inquired about the patient estimate prior to submitting a bid. Commonwealth's Vice President of Business Development testified in deposition that he called the contracting specialist named in the solicitation (who had been the contracting officer for the predecessor contracts) and expressed concern that the estimated number was too high. Exhibit 28 at 66-68. Commonwealth's Vice President was told by the contracting specialist that, "no, it [is] not." *Id*. at 66. The contracting specialist testified that he had no memory of this conversation. Exhibit 27 at 19. Commonwealth provided no contemporaneous evidence regarding this inquiry. Commonwealth did not submit a request for information regarding the estimate. Exhibit 28 at 66.

D. The VA Directive

VA's home oxygen program is governed at the national level by Veterans Health Administration Directive 1173.13, "Home Oxygen Program" (directive). Exhibit 26 at 12-13. After VA issued the solicitation for the contract (July 10, 2020), Exhibit 5 at 1, but prior to Commonwealth's submission of its proposal (August 10, 2020), Exhibit 7, VA issued internally two updates to the directive, which could have altered the number of patients needing home oxygen.

The first update reduced the follow-up time for patients with new prescriptions for home oxygen from six months to three months. Exhibit 45 at 66; Exhibit 26 at 64. VA asserts that this directive update did not change the number of patients served in the NFSG region because providers in that region had "always been evaluating new patients within three months." *Id.* Commonwealth did not know of this update when it submitted its bid but learned of it when conducting research to support its claim. Exhibit 28 at 173-75.

The second update, titled "Clinical Indications for VHA Directive 1173.13 Home Oxygen," was published on August 28, 2020. Exhibit 46. This update directed that prescribing providers "*must* use" the clinical indications in the update. *Id.* (emphasis added). One of those clinical indications was that "[d]esaturation with exercise is no longer a *routine* indication for new prescriptions for home oxygen." *Id.* (emphasis added). This update still permitted physicians to prescribe oxygen "on an individual basis or as part of local policy." *Id.* The COR testified that providers in the NFSG region "still order oxygen for exercise based upon their pulmonary clinical determination" as a result of local policy. Exhibit 26 at 61. The list of clinical indications is posted on "an internal VA Web site that is not available to the public." Exhibit 45 at 65. Commonwealth learned of this update from another company after submitting its proposal. Exhibit 28 at 117-19.

E. COVID-19 Pandemic

In March 2020, the President declared the COVID-19 pandemic a national emergency. Proclamation No. 9994, 85 Fed. Reg. 15337 (Mar. 18, 2020). Throughout the solicitation process and as late as October 2020—after the contract was awarded—neither of the parties fully understood how the pandemic would affect the requirements of the contract. Exhibit 25 at 70; Exhibit 26 at 65–67; Exhibit 28 at 84; Exhibit 29 at 35. Because of this uncertainty, VA did not consider the effects of the COVID-19 pandemic in preparing the estimates for the contract. Exhibit 25 at 70-72; Exhibit 26 at 21, 23-24, 65-67.

III. Execution of Option Years One and Two

The contract's "Option to Extend the Term of the Contract" clause consisted of the standard FAR clause allowing the Government to extend the term by written notice after providing "a preliminary written notice of its intent to extend at least sixty (60) days before the contract expires." Exhibit 9 at 50; *see also* FAR 52.217-9. This standard FAR clause does not contain an explicit time limit within which the Government must provide the written notice of extension; rather, it contains a blank ("[__]") and directs the CO to fill in the appropriate "period of time." FAR 52.217-9. In the contract, "within thirty (30) days" is inserted as the applicable period of time. Exhibit 9 at 50. The contract also included the "Availability of Funds for the Next Fiscal Year" clause, FAR 52.232-19. *Id*. at 50-51.

The first option year of the contract expired on September 30, 2022. Exhibit 22. On August 4, 2022, VA notified Commonwealth that it intended to exercise the second option year. Exhibit 18. On October 1, 2022, the contracting officer exercised the option with a modification to the contract, Exhibit 23, and VA sent the modification to Commonwealth. Exhibit 59.[7] Commonwealth did not object to the exercise of the second option. Exhibit 29 at 41–42, 61.

IV. Proceedings before the Board

Commonwealth submitted two claims to VA. In the first, Commonwealth sought $1,888,388.70, based upon its assertion that VA had prepared negligently the patient estimates. Exhibit 21. After the contracting officer denied this claim, Commonwealth timely appealed to the Board, and the case was docketed as CBCA 7601 on November 30, 2022.

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[7] In her deposition, the contracting officer asserted that if she had exercised option year two on or before September 30, 2022, the date that option year one ended, she would have "been anti-deficient [sic] and used the wrong year['s] money." Exhibit 25 at 84–85, 88.

In the second claim, Commonwealth sought the same amount as its first claim but asserted that VA had exercised improperly the two option years. Exhibit 60. After the contracting officer denied this claim, Commonwealth timely appealed to the Board, and the case was docketed as CBCA 7721 on March 29, 2023. In its answer, VA did not assert the affirmative defense of waiver. Answer to First Amended Complaint (filed Apr. 24, 2023).

The Board consolidated the two appeals and, at the request of the parties, bifurcated consideration of liability and damages. This decision only addresses liability of the parties on the two claims presented by Commonwealth. The parties requested that the Board decide liability on the written record, pursuant to Rule 19 (48 CFR 6101.19 (2023)).

Discussion

I. VA Negligently Prepared the Estimate, but Commonwealth Cannot Establish Reasonable Reliance Because It Failed to Inquire About the Estimate

A. Standard of Review and Burden for a Negligent Estimates Claim

In requirements contracts, "[o]rdinarily, the Government is not liable even in situations where actual purchases vary significantly from Government estimates." *Centurion Electronics Service*, ASBCA 51956, 03-1 BCA ¶ 32,097 (2002), at 158,659, *aff'd sub nom*, *Drew v. Brownlee*, 95 F.App'x 978 (Fed. Cir. 2004). Requirements contracts are selected when the Government is unsure what its actual purchases will be. *Medart, Inc. v. Austin*, 967 F.2d 579, 581 (Fed. Cir. 1992). However, the Government must provide a "realistic estimated total quantity in the solicitation and resulting contract," which may be obtained "from records of previous requirements," based on "the most current information available." FAR 16.503(a)(1). The Government does not need to "search for or create additional information," but it "must act in good faith and use reasonable care in computing its estimated needs." *Medart,* 967 F.2d at 581–82.

The burden of proving that the estimate was unreasonable is on the contractor, even for significant deviations. *Medart*, 967 F.2d at 581. The contractor must prove, by a preponderance of the evidence, "that the government's estimates were 'inadequately or negligently prepared, not in good faith, or grossly or unreasonably inadequate at the time the estimate was made.'" *Agility Defense & Government Services, Inc. v. United States*, 847 F.3d 1345, 1350 (Fed. Cir. 2017) (quoting *Medart*, 967 F.2d at 581).

B. VA Committed Numerous Errors in Calculating the Estimated Monthly Patient Load

1. Math Errors and Historical Data

Commonwealth asserts four different ways in which VA was negligent in preparing the estimates: that the usage of historical data and math to produce the estimates was flawed; that the distribution of the estimate across the entire duration of the contract was improper; that the updates to the directive required VA to revise the estimate or at least disclose the fact of the updates; and that the estimates failed to account for COVID-19. We examine each of these alleged errors in turn.

As discussed above, the COR committed errors in every step of the estimate preparation process, from the calculation of the averages for the historical data to the projection of a five-percent growth rate based upon these averages, which in reality is a ten-percent growth in expected number of patients. Although the Government characterizes these errors as a "very slight tabulation discrepancy," math errors in the calculation of historical averages have been found to constitute negligent preparation of estimates. *E&S Diversified Services, Inc.*, ASBCA 46898, 96-2 BCA ¶ 28,513, at 142,392.

VA compounded its errors by assuming a five-percent growth rate over time. At no point in the period analyzed in the Home O2 Historical Data report was there a growth rate of five percent. The Government "is not free to carelessly guess at its needs." *Medart*, 967 F.2d at 581. Here, the COR's estimate of a five-percent growth rate appears to be a guess. Although the Board agrees with the COR that it is "[e]xtremely important" to ensure VA provides sufficient services to our nation's veterans, VA is obligated to do so in a way that is compliant with the FAR's requirement to provide a "realistic estimate" that is based on "the most current information available." FAR 16.503(a)(1).

With these errors, VA miscalculated the monthly average across fiscal years by more than one percent, then attempted to apply a five-percent growth rate (which had no basis in the data), but accidentally applied a ten-percent growth rate instead. By the end, the COR produced an estimate that was more than thirteen percent higher than it should have been based upon the historical data and almost sixteen percent higher than the actual number of patients that Commonwealth served in the base year.

The oversight provided by the contracting officer in this process was inadequate. It is the *contracting officer's* responsibility to provide "a realistic estimate[]" in the solicitation and the contract. FAR 16.503(a)(1). If the contracting officer had reviewed the basis for the COR's estimates, perhaps these calculation errors would have been discovered and corrected.

2. Estimate Mistakenly Shown As Steady Across Contract Duration

When generating estimates for a contract with option years, the Government generally has no obligation to update estimates for option years after contract award. *Robertson & Penn, Inc.*, ASBCA 55625, 08-2 BCA ¶ 33,951, at 167,982. However, the FAR still requires that the solicitation and contract provide "a realistic, estimated total quantity." *Contract Automotive Repair & Maintenance* (*CARAM II*), GSBCA 12773, et al., 99-2 BCA ¶ 30,530, at 150,782, *aff'd*, 243 F.3d 563 (Fed. Cir. 2000). As reflected in the steady annual growth in the IGCE, the COR expected that the population would grow at a steady rate across the period of the contract. The monthly estimate, rather than increasing, was shown as 3100 across all periods of the contract.

3. Failure to Consider Updates to the Directive

When providing estimates, the Government "should base the estimate on the most current information available." FAR 16.503(a)(1); *see also Womack v. United States*, 389 F.2d 793, 801 (Ct. Cl. 1968) ("[T]he Government . . . is obliged to base [the] estimate on all relevant information that is reasonably available to it."). This "information" includes policies or orders that the Government receives prior to the award of the contract. *Fa. Kammerdiener GmbH & Co., KG*, ASBCA 45248, 94-3 BCA ¶ 27,197, at 135,554.

In this case, the consequence of the two directive updates is disputed. Commonwealth argues that the updates would have reduced the estimated number of patients because fewer clinical indications requiring prescriptions and earlier reevaluation of patients would have been possible consequences of the policy. VA argues that these policies were duplicative of local practice and that the number of estimated patients would not have changed if the COR had considered these policy updates.

We do not find VA's arguments persuasive. Although the clinical indications update permits prescriptions "as part of local policy," Exhibit 46, the Board is concerned that no such policy was introduced into evidence by VA. Commonwealth had received a copy of the first update from another home oxygen contractor, but the Directive itself indicated that the clinical indications—namely, those contained in the second update—are stored on an internal VA website not available to the general public. VA's failure to communicate the existence of this update via an amendment to the solicitation, and its failure to validate its estimate against the update, contributed to the errors in the preparation of the estimate.

4. Neither Party Could Predict How COVID-19 Would Affect the Estimate

The Government was not negligent for failing to account for the possible effects of the COVID-19 pandemic in its estimates. When producing an estimate, "the Government is not required to be clairvoyant, but it is obliged to base that estimate on all relevant information that is reasonably available to it." *Womack*, 389 F.2d at 801. Facts which "were not known, nor could be known, when the estimates of the services required were being made," by definition, cannot be discovered through reasonable care and cannot support a negligent estimate theory. *Solano Aircraft Service, Inc.*, ASBCA 20677, et al., 77-2 BCA ¶ 12,584, at 60,985. Neither party knew how COVID-19 would affect the home oxygen requirements in the NFSG region.

Moreover, both VA and Commonwealth had been operating under pandemic conditions for four months by the solicitation phase of the contract and for more than six months by the time of contract award. Commonwealth cannot enter into a contract in pandemic conditions and then object that those same conditions impaired its ability to perform the contract. *Cf. ORSA Technologies, LLC*, CBCA 7142, 22-1 BCA ¶ 38,042, at 184,744–45 (rejecting contractor's excuse that pandemic created "unforeseeable delays" when contract was entered into after COVID-19). Moreover, Commonwealth assumed any risks that would result from economic hardships brought on by the COVID-19 pandemic (or any other cause) when it entered into a firm-fixed-price contract, "under which [the FAR] 'places upon the contractor maximum risk and full responsibility for all costs and resulting profit or loss.'" *APTIM Federal Services, LLC*, ASBCA 62982, 22-1 BCA ¶ 38,127, at 185,219 (quoting FAR 16.202-1).

C. Commonwealth Failed to Demonstrate Reasonable Reliance on VA's Estimate

In addition to examining whether VA took reasonable care in preparing the patient estimate, we also have to examine whether Commonwealth reasonably relied upon the estimate. *Womack*, 389 F.2d at 801. "The rationale for holding the Government liable for a contractor's damages resulting from negligently prepared estimates . . . is that the contractor has reasonably relied upon such estimates in the preparation" of its bid. *Ambulance Service & Transport of Marlin*, VABCA 3485, et al., 94-2 BCA ¶ 26,729, at 133, 005. A determination as to reasonable reliance includes an obligation for the bidder to consider information that it may have about the estimate and whether the bidder acted reasonably with that information. *Womack*, 389 F.2d at 801 (citing *Snyder-Lynch Motors, Inc. v. United States*, 292 F.2d 907, 909-10 (Ct. Cl. 1961), and *Russell & Pugh Lumber Co. v. United States*, 290 F.2d 938, 941 (Ct. Cl. 1961)). We examine the "extent to which the information [underlying the estimate] is or should have been known by the contractor." *Fairfax Opportunities Unlimited, Inc*., AGBCA 96-178-1, 98-1 BCA ¶ 29,556, at 146,523.

As the incumbent contractor, Commonwealth had access to and was the source of all of the data used by the COR to generate the estimate. As Commonwealth explained in its brief, that historical data did not support the estimate and showed patient numbers decreasing, rather than increasing. Appellant's Initial Brief at 24-25. Although Commonwealth did not know that its invoices from the prior contract were the only data used to generate the estimate, it knew enough about the number of patients served on the prior contract to inquire. *See Ambulance Service*, 94-2 BCA at 133, 006 (finding no evidence that the contractor knew of declining numbers on prior contract).

Commonwealth asserts that it called VA to discuss the estimate and was told that the number was not high. Commonwealth has provided no contemporaneous evidence of this call, and the VA official testified that he did not remember the call. Taking at face value Commonwealth's assertion that its Vice President was concerned enough to call, Commonwealth's inquiry should not have ended there given the importance of estimates in preparing its bid. Commonwealth's assertion that it was not told to submit a request for information about the estimate is not persuasive because it is not incumbent upon government personnel to direct contractors to take such actions. *See MLU Services, Inc.*, CBCA 8002, slip op. at 18 (Sept. 9, 2024) (finding that the Government is not obligated to tell a contractor how to administer its contract). Based upon the circumstances of this case, having failed to undertake a further inquiry, Commonwealth cannot demonstrate reasonable reliance upon the estimate, given what it knew from the previous contract.

We realize that our holding is tied in large part to Commonwealth's role as the incumbent on the predecessor contract. A contractor without that experience and access to the underlying historical data may have prevailed upon the negligent estimate theory. However, to give Commonwealth a pass on its role as the incumbent would violate the long-standing rule regarding the obligation of contractors to address defects before contract execution. "If a contractor is aware of a defect in a contract's terms before it is awarded the contract, it cannot remain silent and complain about it for the first time after performance has commenced." *Sage Acquisitions, LLC v. Department of Housing & Urban Development*, CBCA 7319, 23-1 BCA ¶ 38,315, at 186,059, *appeal docketed*, No. 23-1907 (Fed. Cir. May 19, 2023); *see also Meridian Global Consulting, LLC v. Department of Homeland Security*, CBCA 6906, 21-1 BCA ¶ 37,875, at 183,915 (contractor "waived or forfeited . . . reliance on" dates in solicitation that differed from contract). Based upon its experience with the predecessor contract, Commonwealth's Vice President was concerned enough about the estimate to contact a VA contracting official. It cannot benefit now from its failure to follow through with that concern.

II. Commonwealth's Challenge to the Options Exercise Fails

A. The Exercise of Options Was Not Arbitrary and Capricious

Commonwealth advances two arguments, one substantive and one procedural, in its challenge to VA's exercise of the option years on the contract. One, Commonwealth argues that VA was arbitrary and capricious in exercising the option years given that declining patient numbers showed that VA did not need the level of services that it had estimated. Two, Commonwealth asserts that the second option year was executed late.

Although Commonwealth urges the Board to examine its challenge based upon the arbitrary and capricious standard, it is not clear that this standard is to be applied when it is alleged that the exercise of an option is improper. Commonwealth cites to cases in which the standard was applied in challenges for failure to exercise an option. *See, e.g.*, *Blackstone Consulting, Inc. v. General Services Administration*, CBCA 718, 08-1 BCA ¶ 33,770, at 167,161. Cases in which an exercise has been challenged focus upon whether the Government complied with the timing requirements in the options clause. *See*, *e.g.*, *Alliant Techsystems, Inc. v. United States*, 178 F.3d 1260, 1272 (Fed. Cir. 1999)*; NVT Technologies, Inc.*, EBCA C-0401372, 04-2 BCA ¶ 32,660, at 161,658. The Government's right to exercise options is broad and unilateral. *Tecom, Inc.*, IBCA 2970 a–l, 95-2 BCA ¶ 27,607, at 137,592–93. The FAR directs only that the contracting officer provide for the possibility of options "if there is an anticipated need for similar services beyond the first contract period." FAR 17.202(d). VA had a need for home oxygen services after the base year, as shown by the orders that Commonwealth received. Commonwealth's challenge is that VA's need was not as great as it had estimated. But, as the contract clearly states, the difference between estimated quantities and actual orders does not provide the basis for an equitable adjustment under the contract.

Even assuming that "arbitrary and capricious" is the proper lens through which to examine Commonwealth's challenge, Commonwealth has not met that standard. Four factors are considered in determining whether a government action is arbitrary or capricious: (1) subjective bad faith of the Government; (2) lack of contract-related basis for decision; (3) amount of discretion of the government official; and (4) violation of applicable statute or regulation. *ALK Services, Inc.*, CBCA 1789, et al., 13-1 BCA ¶ 35,260, at 173,079 (citing *McDonnell Douglas Corp. v. United States*, 182 F.3d 1319, 1326 (Fed. Cir. 1999)). "In the absence of a showing that the Government acted in bad faith, it will be presumed to have made its decision based on valid business reasons." *Id.* at 173,079.

Although VA committed errors in the preparation of the estimates, we do not find that the Government's conduct rises to the level of subjective bad faith. To prove bad faith, Commonwealth must show that VA had a specific intent to injure it. *Road & Highway*

Builders, LLC v. United States, 702 F.3d 1365, 1368-69 (Fed. Cir. 2012). Commonwealth provided no evidence to establish that this standard has been met. None of the actions that the contracting officer or COR took, even with the mistaken calculations, demonstrate bad faith towards Commonwealth. The contracting officer was within her discretion to exercise the option years based upon VA's need for the services and Commonwealth's successful performance.

The only factor on which Commonwealth has provided evidence of potential arbitrary and capricious conduct is the violation of a statute or regulation. *ALK Services*, 13-1 BCA at 173,079. By failing to provide an accurate estimate as required by FAR 16.503(a)(1), VA violated applicable regulations. However, this violation is not sufficient to establish that the contracting officer acted in an arbitrary and capricious manner when she exercised the option years, particularly since Commonwealth was not prejudiced by that error for the reasons that we discussed above.

B. Commonwealth Waived the Untimely Exercise of Option Year Two

Timeliness for option exercise is construed strictly in recognition of the power conveyed by the party providing the option. *Tecom*, 95-2 BCA at 137,592–93. Government insistence on compliance with a contract and its terms after failure to timely exercise an option can be considered a constructive change. *E.g.*, *International Telephone & Telegraph v. United States*, 453 F.3d 1283, 1291 (Ct. Cl. 1972).

Pursuant to the terms of the Option clause, VA's exercise of the second option on October 1, 2022, was late. The clause required VA to provide written notice within thirty days, provided that it gave "preliminary written notice of [VA's] intent to extend at least sixty (60) days before the contract expires." FAR 52.217-9. Because the first option year expired on September 30, the Government was obligated to exercise the option on or before September 30. *See NVT Technologies, Inc.*, 04-2 BCA at 161,658; *Tecom,*95-2 BCA at 137,593. Further, it did not provide preliminary notice of its intent to extend until August 4, 2022, which was less than sixty days before the contract was set to expire.

VA incorrectly asserts that the Anti-Deficiency Act (ADA) prevented the contracting officer from exercising the option earlier. The ADA prohibits government employees from authorizing "an expenditure or obligation exceeding an amount available in an appropriation or fund" or involving the government "in a contract or obligation for the payment of money before an appropriation is made." 31 U.S.C. § 1341(a)(1)(A)–(B) (2018). Contracting officers are permitted to execute contracts in advance of appropriations if the contracting officer "[e]xpressly condition[s] the contract upon availability of funds in accordance with [FAR] 32.703-2." FAR 32.702(b). Because the contract contained the Availability of Funds clause, the contracting officer could not run afoul of the limitations of the ADA by exercising

the option before receiving the necessary appropriation. *Cessna Aircraft Co. v. Dalton*, 126 F.3d 1442, 1452 (Fed. Cir. 1997).

VA asserts that Commonwealth "waived" the late exercise of the option by continuing performance of the contract into the second option period. Respondent's Response Brief at 44-46. Waiver is an affirmative defense that VA should have asserted in its answer to the complaint. Fed. R. Civ. P. 8(c). Despite VA's failure to do so, Commonwealth did not object or allege prejudice in response to VA's assertion of waiver in its brief. *See* Appellant's Reply Brief at 25. Accordingly, we reach the merits of VA's assertion. *A-Son's Construction, Inc. v. Department of Housing & Urban Development*, CBCA 3491, 15-1 BCA ¶ 36,089, at 176,206, *clarified on other grounds*, 15-1 BCA ¶ 36,184.[8]

A party can voluntarily relinquish, or waive, its right to pursue a claim by continuing performance without objection. *Westfed Holdings, Inc. v. United States*, 407 F.3d 1352, 1360 (Fed. Cir. 2005); *see E. Walters & Co. v. United States*, 576 F.2d 362, 367 (Ct. Cl. 1978) ("Nor did plaintiff timely protest the exercise of the first option. The board opinion is correct in characterizing this silence until after final delivery, as a waiver."); *USD Technologies, Inc.*, ASBCA 31305, 87-2 BCA ¶ 19,680, at 99,618 ("[A] contractor may be estopped from avoiding its obligations under an option by its failure to protest the improper or ineffective exercise of the option at the time it knows or has reason to know that the option was not exercised properly."), *aff'd*, 845 F.2d 1033 (Fed. Cir. 1988) (unpublished). Waiver is based on the concept that parties who do not contemporaneously object to improper conduct are not "in a good posture" to complain about it later. *Swinging Hoedads*, AGBCA 85-308-3, 86-3 BCA ¶ 19,135, at 96,725. A reservation of rights is often the "critical factor" determining whether a party waived a claim. *Northern Helex Co. v. United States*, 455 F.2d 546, 555 (Ct. Cl. 1972). For claims arising from untimely exercise of options, the reservation of rights generally must occur promptly upon discovery of the untimely exercise. *Compare Tecom*, 95-2 BCA at 137,597 (claim not waived when contractor hired new employee

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[8] We could alternatively address VA's argument as one of forfeiture, which is not listed as an affirmative defense in the Federal Rules of Civil Procedure and is "the failure to make the timely assertion of a right," rather than an "intentional relinquishment or abandonment of a known right." *United States v. Olano*, 507 U.S. 725, 733 (1993) (internal quotation marks omitted). The Court of Appeals for the Federal Circuit recognizes that, in its decisions, it often "uses the term 'waiver' when applying the doctrine of 'forfeiture.'" *In re Google Technology Holdings LLC*, 980 F.3d 858, 862 (Fed. Cir. 2020). Such waiver cases "are good law" for cases "involving the issue of forfeiture." *Id*. at 862 n.8; *see Voice Tech Corp. v. Unified Patents, LLC*, 110 F.4th 1331, 1340 & n.1 (Fed. Cir. 2024) (describing as "forfeiture" what a prior circuit panel had called "waiver"). Regardless of terminology, we find that Commonwealth abandoned its claim by not timely asserting it.

experienced in option exercise and "promptly filed a claim"), *with CARAM* (*CARAM I*), GSBCA 12773, et al., 95-1 BCA ¶ 24,488, at 136,975-76 (claim waived for first of several allegedly untimely exercised option years when contractor did not object for the entire period), *claims denied by CARAM II*, 99-2 BCA at 150,788.

Commonwealth waived or forfeited its objections to the late exercise of the option year. Commonwealth continued performance and did not object until January 24, 2023, almost four months into the extended option year.

Commonwealth cites *Tecom* as support for the assertion that it did not waive its right to object. Appellant's Reply Brief at 26–27. By the time new contractor personnel noticed that the option had been exercised late, contract performance was about one-third complete. *Tecom*, 95-2 BCA at 137,597. In contrast, Commonwealth's Vice President had been responsible for Commonwealth's VA contracts in multiple regions since 1996. Exhibit 28 at 15–16. Unlike the contractor in *Tecom*, he could have promptly objected to the untimely performance. Commonwealth's failure to do so extinguished the claim.

Decision

The appeals are **DENIED**.

Marian E. Sullivan
MARIAN E. SULLIVAN
Board Judge

We concur:

Erica S. Beardsley
ERICA S. BEARDSLEY
Board Judge

Kyle Chadwick
KYLE CHADWICK
Board Judge