UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

APPELLANT'S MOTION FOR SUMMARY JUDGMENT DENIED;
RESPONDENT'S MOTION FOR SUMMARY JUDGMENT GRANTED IN PART:
March 24, 2025

CBCA 7269, 7675, 7784, 7898, 7899, 7900, 7919, 8022

JITA CONTRACTING, INC.,

Appellant,

v.

DEPARTMENT OF TRANSPORTATION,

Respondent.

Ivan A. Sarkissian and Nathaniel Rioux Jordan of McConaughy & Sarkissian, P.C., Denver, CO, counsel for Appellant.

Jack F. Gilbert and Emma R. Vyncke, Office of Chief Counsel, Federal Highway Administration, Department of Transportation, Lakewood, CO, counsel for Respondent.

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

CHADWICK, Board Judge.

A subagency of respondent, Department of Transportation (DOT), terminated for default a road construction contract with appellant, JITA Contracting, Inc. (JITA). In these eight consolidated appeals, JITA challenges the termination and seeks delay damages and the return of amounts withheld for delay. Both parties move for summary judgment. We grant DOT's motion in part and otherwise deny the motions.

We reject JITA's argument that the default termination was invalid because DOT lost its right to enforce the completion date in the contract. We reject—largely as unsupported by citations to record evidence—DOT's arguments for summarily sustaining its termination claim and for denying JITA's claims based on project delay. We agree with DOT, however, that the contract included price disincentives for failure to meet an interim completion date, so we grant DOT's motion to that limited extent.

Background

We deem the following facts to be undisputed based on the amended statements of undisputed material facts, amended statements of genuine issues, and record evidence cited in those filings. *See* Board Rule 8(f)(1), (2) (48 CFR 6101.8(f)(1), (2) (2023)); *Avue Technologies Corp. v. Department of Health & Human Services*, CBCA 8087(6360)-REM, et al., 24-1 BCA ¶ 38,617, at 187,709 n.1.[1]

JITA and the Federal Highway Administration, a DOT component, executed the contract for road work in Mesa Verde National Park in Colorado on February 4, 2021. The contract divided the work into schedule A (the primary work) and three awarded options. The completion date for the schedule A work, reconstructing a roadway "loop," was June 15, 2021. Work on at least one of the options could not begin until the primary work was finished, and all work including the options was to be completed by September 6, 2021. The contract contained provisions for weather delays, but the parties do not direct us to any indication that the work was limited to certain seasons of the year.

The contract included both "disincentive deductions" from the contract price if JITA did not timely complete the schedule A work and a table of graduated "liquidated damages"

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[1] Consistent with *Avue Technologies*, we disregard unexplained demurrals in the statements of genuine issues. DOT, for example, "refers the Board" generally "to the plans and specifications" as clarifying evidence. We will not search the exhibits and guess what DOT means. "[I]t is the duty of counsel, not the Board, to advocate for their respective clients." *Lebolo-Watts Constructors 01 JV, LLC*, ASBCA 59740, et al., 21-1 BCA ¶ 37,789, at 183,426 (2020), *aff'd*, No. 21-1749, 2022 WL 499850 (Fed. Cir. Feb. 18, 2022). We also disregard exhibits to DOT's amended statement of genuine issues that are not Rule 4 appeal file exhibits. The Board ordered in March 2022 that "[s]tatements filed under Rule 8(f)(1) and (2) shall cite appeal file exhibits rather than separate exhibits attached to briefs, except for deposition excerpts. This may require a movant to coordinate its supplementation of the appeal file with the drafting of its motion." (Emphasis omitted.)

starting at $1600 per day for late completion of the entire contract.[2] The contract referred to the schedule A completion date as "an interim completion date." It further stated: "Failure to substantially complete the work within the timeframe described below [the June 15, 2021, interim completion date] will result in the assessment of disincentives at a rate of $2,700 per calendar day. If Schedule A only is awarded, the disincentive deductions will be in addition to any Contract administration liquidated damages."

The agency issued the notice to proceed on or about March 8, 2021. JITA mobilized promptly. Between March 4 and April 18, JITA submitted multiple project schedules that showed substantial completion of the schedule A work between three and twenty-eight days past the required date of June 15. One schedule submitted in this time period projected timely completion. (The parties do not cite any schedules for the option work.)

Problems arose in April 2021 relating to pouring concrete. After correspondence and meetings, the agency sent JITA a letter of concern on May 19. In the letter, after citing specific events, the agency expressed concern about JITA's "lack of adequate progress" and asked for a corrective action plan within seven days. Two days later, JITA submitted a schedule showing the schedule A work ending on August 24, sixty-four days late. This was the earliest completion date of the primary work that JITA would submit from then on.

JITA responded to the agency's letter of concern on June 10, 2021 (fifteen days late). JITA's response letter stated that "Critical Path has been affected with the concrete removal" ordered by the agency. JITA did not propose a new schedule.

On June 17, 2021, two days after the interim completion date of the schedule A work, the contracting officer's representative wrote to JITA that "all concrete placed to date on Schedule A is rejected and must be removed and replaced."

On July 1, 2021, a JITA representative emailed the agency's project manager noting that the agency had begun to record (but not actually to collect) price deductions for late completion of the schedule A work in approving progress payments. The JITA employee objected that "[t]his is not what we had agreed to" in a recent conversation. Although, here and elsewhere, the parties referred to the deductions in their correspondence as "LDs," or

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[2] The liquidated damages clause was a tailored version of 48 CFR 52.211-12 (Sep. 2000). The maximum daily rate for liquidated damages was $6500 per day if the total liquidated damages exceeded $10 million.

liquidated damages, the parties now agree that the deductions DOT was recording at this point in 2021 were the "disincentive deductions" specified in the contract.[3]

The agency's project manager responded to the July 1 email by letter the same day. He wrote at the end of the first paragraph:

> I will state it again "If JITA demonstrates positive gains by achieving approved work and maintains a schedule." LD's [sic] will be reduced but not eliminated. We have missed the completion date of Schedule A. I have not seen a recovery schedule that shows how JITA will accelerate their schedule to complete the project. JITA has submitted schedules for completing schedule A in mid to late August and now the latest schedule shows completion in mid-September. This is simply not acceptable. My client [agency] is losing revenue by JITA['s] inability to achieve a schedule and complete the project.

The letter ended: "Lastly, it should be noted that failure to increase progress thought [sic] contracted project items following the project documents . . . may result in issuance of a cure notice or order to show cause why the contract should not be terminated for default."

On July 7, 2021, the agency issued a second letter of concern and requested another corrective action plan within seven days. The agency's one-page letter stated, among other things, that there was no "concrete placement, grade preparation, or asphalt paving on site that meets contract specifications" and that "liquidated damages [sic; actually disincentives] will continue to accrue." JITA responded in a two-page letter on July 14. JITA blamed the agency for its lack of progress, objected again to the imposition of the deductions, and pledged that it was "fully committed to and engaged with getting this project completed expeditiously; but we cannot do so without [the agency], and we need [the agency] to work with us and not against us." JITA did not propose a new schedule. Its latest schedule, dated July 8, showed substantial completion of the schedule A work on August 31, 2021, seven days before the September 6 final completion date for all work.

Meetings and correspondence about achieving progress on the project continued in the summer. JITA's schedule dated August 26, the last update that JITA would submit until late October 2021, showed completion of the schedule A work on October 27, 2021, which was 134 days past the interim completion date for that work and fifty-one days after the contract's final completion date.

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[3] As discussed below, both parties address entitlement to these amounts under the contract language applying to "disincentive deductions."

The last progress payment processed and paid by DOT was for work accepted by DOT through August 31, 2021. On September 24, eighteen days after the final completion date of September 6, the agency issued a show cause notice. The letter stated that "all the contract time has elapsed" and that "[b]ased on the remaining work to be completed, documented production rates and performance to date," the agency had "serious concern JITA will not be able to complete the project in a timely fashion, let alone this calendar year." The agency directed JITA "to show cause" by October 4 "why JITA's contract should not be terminated for default." It noted, "A final decision on this matter has not been made." The notice letter did not refer to liquidated damages.

JITA responded, through counsel, on October 7, 2021 (three days late), by letter styled as a "confidential settlement offer." JITA denied it was in default and blamed all of the delay on the agency's "unreasonable rejection and demand for replacement of the concrete, along with . . . other failures and refusals . . . including, but not limited to, the refusal of the solution offered [by JITA] to mitigate the negative impact on the schedule." JITA proposed "that the parties [sic] accept and pay for all proper work, reset the schedule to allow for the Schedule A work to recommence and be completed in calendar year 2022, and agree to a mutually determined removal of the remainder of the work from the Contract Documents."

JITA remained on site for three more weeks. On October 14, 2021, the parties held a meeting. On Monday, October 25, JITA advised the agency that it would demobilize on Friday, October 29. JITA submitted a contingent schedule estimating that, with agency cooperation, it could finish the schedule A work by August 9, 2022, after demobilizing and remobilizing. DOT advised JITA by letter on October 26 that, per the contract, JITA would "be responsible for repair of any damages to work during suspended work and until final acceptance" and must, among things, perform inspections and maintain traffic control during any suspension. Two days later, on October 28, the chief of the awarding subagency's construction branch sent JITA an eleven-page letter, including charts and photographs, explaining that the agency disagreed with two expert reports JITA had submitted on the quality of its concrete installation and reaffirming the agency's position that "[t]he work to date fails to conform to the contract's requirements."

JITA demobilized on October 29, 2021. Its last schedule showed the next activity after remobilization in the spring of 2022 as "TENTATIVE—Demo all curb, sidewalk and minor concrete paving." JITA never removed any of the concrete that the agency had rejected and ordered to be replaced in June 2021.

DOT terminated the contract for default on November 10, 2021. The termination notice stated, "This action is based on Jita's failure to complete [sic] the Schedule A interim completion date of June 15, 2021 and Option . . . completion date of September 6, 2021 as

well as Jita's lack of meaningful progress to complete the contract and significant demobilization from the project site."

A tender agreement executed in March 2022 by DOT and JITA's surety recites that the surety paid DOT, among other amounts, disincentives of $399,600 and liquidated damages of $416,000 under the contract.

Board Proceedings

JITA filed the eight appeals that are consolidated in this matter between December 2021 and February 2024. In the first appeal, CBCA 7269, JITA challenges the November 2021 termination for default. By Board order, DOT filed the complaint in that appeal and JITA filed the answer. *See* Board Rule 6(a) ("The Board may in its discretion order a respondent asserting a claim to file a complaint."). DOT's complaint, filed in January 2022, contains one count titled, "The Government's Termination for Default Was Justified and Should be Affirmed as Appellant Failed to Meet the Contract Completion Date." JITA's second amended answer in that appeal, which the Board accepted over DOT's objection in September 2023, asserts seven affirmative defenses, including, "Respondent waived its right to terminate [the contract] for default." *Jita Contracting, Inc. v. Department of Transportation*, CBCA 7269, et al., 23-1 BCA ¶ 38,431, at 186,777.

The other seven appeals involve claims by JITA for time extensions as defenses to the default termination, delay damages, and relief from payment deductions. JITA filed each of those seven appeals within ninety days of receiving contracting officer's decisions on certified claims. The parties agreed to consolidation. In CBCA 7675, which concerns disincentives and liquidated damages, the Board designated the contracting officer's decision as the complaint and the claim as the answer in March 2023. JITA filed a consolidated complaint in the next five appeals (CBCA 7784, 7898, 7899, 7900, and 7919), which arise from delay claims, in November 2023. DOT answered that complaint in December 2023. In CBCA 8022, which involves another delay claim, the Board designated the claim as the complaint and the contracting officer's decision as the answer in March 2024.

Discovery began in March 2022 and ended in the consolidated case after several extensions in October 2024 except for one expert deposition. The parties filed cross-motions for summary judgment in December 2024 and filed amended documents with corrected record citations in February 2025.[4]

[4] JITA filed an amended opposition brief and statement of genuine issues. DOT filed amended versions of all of its filings except its reply brief. From here on, we rely on the latest versions of all filings without identifying any of them as "amended."

Discussion

We apply the familiar standards for cross-motions for summary judgment. "[A] party may move for summary judgment on all or part of a claim or defense which we will only grant if the party 'is entitled to judgment as a matter of law based on undisputed material facts."' *Mission Support Alliance, LLC v. Department of Energy*, CBCA 6477, 20-1 BCA ¶ 37,657, at 182,834 (quoting Rule 8(f)). In addressing each motion, we draw all factual inferences in favor of the non-movant. *See Mingus Constructors, Inc. v. United States*, 812 F.2d 1387, 1390–92 (Fed. Cir. 1987). "[S]ummary judgment is inappropriate if the factual record is insufficient to allow [us] to determine the salient legal issues." *Mansfield v. United States*, 71 Fed. Cl. 687, 693 (2006), *cited in CSI Aviation, Inc. v. General Services Administration*, CBCA 6543, 20-1 BCA ¶ 37,580, at 182,479.

The claims placed at issue by dispositive motions are claims in pleadings, not claims found elsewhere in the record. *See Mission Support Alliance, LLC v. Department of Energy*, CBCA 6477, 22-1 BCA ¶ 38,033, at 184,711 (2021) (limiting motions to dismiss under Rule 8(e) to "claims that are asserted, or at least incorporated, in pleadings"); *see also Tucker v. Union of Needletrades, Industrial & Textile Employees*, 407 F.3d 784, 788 (6th Cir. 2005) ("A non-moving [claimant] may not raise a new legal claim for the first time in response to the opposing party's summary judgment motion" but must instead move "to amend the complaint." (quoting 10A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure* § 2723 (3d ed. Supp. 2005))); *B-K Lighting Inc. v. Vision3 Lighting*, 930 F. Supp. 2d 1102, 1132 (C.D. Cal. 2013) (similar). We do not adjudicate claims asserted only outside the pleadings. *See* 41 U.S.C. §§ 7104(b)(4), 7105(e)(2) (2018) (appeals are de novo); *Caring Hearts EMS, Inc. v. Department of Veterans Affairs*, CBCA 8148, 25-1 BCA ¶ 38,719, at 188,255, 188,257; *Mission Support Alliance*, 20-1 BCA at 182,834.

The Completion Date Remained Enforceable

JITA's sole argument for summary judgment is that DOT wrongly terminated for default because the agency had already "waived the completion date."[5] We disagree. Under longstanding precedent, if "the Government elects to permit a delinquent contractor to continue performance past a due date, it surrenders its alternative and inconsistent right under

[5] JITA's motion, although styled as a motion for summary judgment, seeks partial summary judgment. It could, if granted, resolve CBCA 7269 but not necessarily the entire case, as any entitlement to payment would then be under the contract's termination for convenience clause. *Schlesinger v. United States*, 390 F.2d 702, 710 (Ct. Cl. 1968); *see CTA I, LLC v. Department of Veterans Affairs*, CBCA 5826, et al., 22-1 BCA ¶ 38,083, at 184,947–48 (discussing termination for convenience costs under construction contract).

the Default clause to terminate, assuming [(1)] the contractor has not abandoned performance and [(2)] a reasonable time has expired for a termination notice[.]" *DeVito v. United States*, 413 F.2d 1147, 1153 (Ct. Cl. 1969), *quoted in BES Design/Build, LLC v. Department of Veterans Affairs*, CBCA 6453, et al., 23-1 BCA ¶ 38,319, at 186,074 (noting that only unusual circumstances justify this result in construction cases because "detrimental reliance [by the contractor] is difficult to establish" (quoting *AmerescoSolutions, Inc.*, ASBCA 56811, 10-2 BCA ¶ 34,606, at 170,549)), *appeal dismissed*, No. 23-2270 (Fed. Cir. Oct. 26, 2023). This principle has been called the "*DeVito* waiver" rule or doctrine. *E.g.*, *GSC Construction, Inc.*, ASBCA 59402, et al., 21-1 BCA ¶ 37,751, at 183,232; *Waiver of the Right to Terminate for Default: The Impact of No-Waiver Language*, 13 Nash & Cibinic Rep. ¶ 64 (1999).

It appears that in the current usage of the Court of Appeals for the Federal Circuit, a party's accidental loss of a contractual right, as under *DeVito*, may be more accurately called a forfeiture rather than a waiver. *See Commonwealth Home Health Care, Inc. v. Department of Veterans Affairs*, CBCA 7601, 24-1 BCA ¶ 38,673, at 188,009 n.8 (citing, inter alia, *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")). We use "waive," "forfeit," and similar terms such as "lose" interchangeably here. *See In re Google Technology Holdings LLC*, 980 F.3d 858, 862 n.8 (Fed. Cir. 2020) (waiver cases "are good law" for cases "involving the issue of forfeiture").

DOT terminated the contract sixty-five days after the stated final completion date. Because JITA did not abandon the job, we must decide whether DOT acted within "a reasonable time" under all the circumstances. *DeVito*, 413 F.2d at 1153–54; *Hughes Group LLC v. Department of Veterans Affairs*, CBCA 5964, 23-1 BCA ¶ 38,297, at 185,934–35. A reasonable period in which to terminate may be relatively long under a construction contract "because those contracts generally contain clauses which entitle (1) the contractor to receive payment for work performed after the specified completion date and (2) the government to recover liquidated damages for late completion," meaning that continued work after a completion date is not unusual. *Technocratica*, ASBCA 47992, et al., 06-2 BCA ¶ 33,316, at 165,187. In *Florida, Department of Insurance v. United States*, 81 F.3d 1093 (Fed. Cir. 1996), the Federal Circuit affirmed a decision sustaining a default termination of a construction contract, which was being performed by a surety, approximately eight months after the completion date, while "liquidated damages stemming from [the original contractor's] default continued to accrue." *Id*. at 1095–97. The surety, the Court said, "could not reasonably have believed that time was not of the essence or that its previous periods of delay had been excused." *Id*. at 1097.

JITA likens this case to ones in which the facts justified holding a completion date in a construction contract unenforceable under *DeVito*. *E,g.*, *Technocratica*, 06-2 BCA at

165,189 (agency's actions "constituted a manifestation it was electing to waive the contractually specified completion date"); *Martin J. Simko Construction, Inc. v. United States*, 11 Cl. Ct. 257, 269 (1986), *vacated in non-relevant part and remanded*, 852 F.2d 540 (Fed. Cir. 1988); *Overhead Electric Co.*, ASBCA 25656, 85-2 BCA ¶ 18,026, at 90,472–73. The common element in such cases is agency acquiescence in late performance. *See Technocratica*, 06-2 BCA at 165,188 (agency's request for new schedule "did not state . . . that [the agency] continued to deem the contractually specified completion date to be in effect or that liquidated damages were accruing"); *Martin J. Simko*, 11 Cl. Ct. at 270 (agency terminated contract "[m]ore than 13 months after the extended final completion date" after repeatedly urging contractor to perform);[6] *Overhead Electric*, 85-2 BCA at 90,473 ("The Government neither mentioned nor assessed liquidated damages and thus treated the completion date as no longer being of the essence."); *see also Hughes Group*, 23-1 BCA at 185,935 ("Waiver can . . . be found in the termination notice" which "sought to terminate . . . while concurrently securing . . . continued performance."); *B.V. Construction, Inc.*, ASBCA 47766, et al., 04-1 BCA ¶ 32,604, at 161,350–51 (contract had no liquidated damages clause and agency "showed no degree of urgency"); *Corway, Inc*., ASBCA 20683, 77-1 BCA ¶ 12,357, at 59,804 ("[L]iquidated damages were never mentioned[.]").

DOT displayed no such acquiescence here. JITA fails to raise a genuine dispute of fact in this regard. The agency began documenting disincentive deductions of $2700 per day promptly after JITA missed the interim completion date in June 2021. Understandably, the people working on the contract referred to the interim price deductions imprecisely as liquidated damages.[7] We see no evidence that DOT told JITA that liquidated damages, identified as such, would run after the final completion date in September 2021—but DOT had no particular reason to issue such a warning. JITA did not submit a pay application for any work performed after the final completion date, and DOT had already been asserting the disincentives for months. The show cause notice issued eighteen days after the final

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[6] The *Martin J. Simko* court stated in 1986 that applicable case law "involve[d] a time period for the contracting officer to weigh the circumstances of only a few days to a month." 11 Cl. Ct. at 269–70. That is no longer true. *E.g*., *Florida, Department of Insurance*, 81 F.3d at 1095–97 (discussed above); *BES Design/Build*, 23-1 BCA at 186,074 (completion date enforceable five months later); *AmerescoSolutions*, 10-2 BCA at 170,549 (completion date enforceable eighty-four days later).

[7] Indeed, the term "disincentive deduction" seems to be unusual. We do not find it in our case law or in decisions of other government contracts tribunals or the court of appeals. See, however, *Red Bobtail Transportation*, ASBCA 63771, 24-1 BCA ¶ 38,591, at 187,616–17 (involving "negative performance incentives" in a trucking contract).

completion date referred to the date as effective (but "elapsed") and left no doubt that DOT was weighing its options including default termination.

The relevant span of time is not truly, for that matter, the entire sixty-five days between the final completion date and the termination date but the fifty-three days between the final completion date and October 29, 2021, when JITA demobilized. JITA made no material effort to perform after it demobilized, and DOT did not urge JITA to make progress over the winter. The exact number of days (twelve) it took DOT to terminate the contract after JITA departed the site has no real bearing on whether DOT was still, as far as JITA knew, "treat[ing] the completion date as . . . being of the essence." *Overhead Electric*, 85-2 BCA at 90,473. JITA had suspended its work until 2022. Waiting a few more days to terminate would not have conveyed a materially different message.

In sum, we see no facts, disputed or undisputed, that could support JITA's assertion that DOT's "actions through the construction of the Project indicate[d] that" the agency "did not believe the completion date of the contract was enforceable." JITA further argues that DOT seemed to "indicate that Project completion after the contract deadlines was acceptable." But evidence of that kind could not—even if uncontroverted—show a *DeVito* forfeiture under a construction contract like this one as a matter of law. *E.g.*, *BES Design/Build*, 23-1 BCA at 186,076 ("[W]e find that the contracting officer offered BES a reasonable length of time [five months] to complete the project before terminating for default."); *Technocratica*, 06-2 BCA at 165,187. The test is whether, by the termination date, JITA "could . . . reasonably have believed that time was not of the essence or that its previous periods of delay had been excused." *Florida, Department of Insurance*, 81 F.3d at 1097. We deny JITA's motion because JITA identifies no undisputed facts sufficient to support a finding that such beliefs on its part could have been reasonable.

Material Disputes of Fact Regarding Contract Performance Exist

We turn to DOT's motion. DOT bears the burden to show that JITA was in default on the termination date. *E.g.*, *DCX, Inc. v. Perry*, 79 F.3d 132, 134 (Fed. Cir. 1996); *Lisbon Contractors, Inc. v. United States*, 828 F.2d 759, 764 (Fed. Cir. 1987). The agency seeks summary judgment sustaining the termination on what DOT terms "three independent" grounds. DOT asserts that JITA (1) "failed to comply with the order to remove and replace the concrete installed on the project . . . by the project completion deadline," (2) "failed to complete the Contract on time," and (3) "failed to provide adequate assurances in response to the Show Cause Notice."

As JITA points out, however, the first and third grounds asserted by DOT for sustaining the default termination are new additions at the summary judgment stage. DOT's

January 2022 complaint in CBCA 7269, which DOT has filed no motion to amend, does not raise either of those theories of default. As the complainant in that appeal, DOT needed to allege in plain terms providing fair notice to JITA "the factual basis upon which the contracting officer terminated the contract, *as well as any other basis* . . . upon which the Government m[ight] rely before the Board to support the default termination." *Muhammad v. Department of Justice*, CBCA 5188, 16-1 BCA ¶ 36,267, at 176,918 (emphasis added) (citing *JR Services, LLC v. Department of Veterans Affairs*, CBCA 4826, 16-1 BCA ¶ 36,238, at 176,808–09). DOT alleged in its one-count complaint only that JITA did not complete the work by the final completion date. DOT did not allege that it was justified in terminating the contract based on JITA's failure to replace the concrete as directed or to provide adequate assurances of performance after the completion date. We will not allow DOT to invoke a new, unfiled version of its complaint on which to seek summary judgment.[8]

Non-binding decisions interpreting the Federal Rules of Civil Procedure, which we may consult for guidance per Board Rule 1(c), suggest that we may treat DOT's reliance on new, unpleaded reasons for the termination "as a [constructive] motion to amend the complaint," which we are within our discretion to deny as "a circuitous request for an amendment after summary judgment motions had been docketed." *Kunelius v. Town of Stow*, 588 F.3d 1, 19 (1st Cir. 2009) (citing, inter alia, *Stover v. Hattiesburg Public School District*, 549 F.3d 985, 989 n.2 (5th Cir. 2008); *Brooks v. AIG SunAmerica Life Assurance Co.*, 480 F.3d 579, 590 (1st Cir. 2007)); *see also J.H. v. Williamson County, Tennessee*, 951 F.3d 709, 722 (6th Cir. 2020) ("[O]nce a case has progressed to the summary judgment stage, . . . the liberal pleading standards under the Federal Rules are inapplicable."). DOT argues in its reply in support of summary judgment that JITA took extensive discovery regarding the dispute about the concrete and was not, therefore, prejudiced by DOT's failure to plead that basis for the termination.[9] We find that, at a minimum, DOT should have presented its argument that JITA would not be prejudiced by an expansion of DOT's three-year-old complaint in DOT's first brief, with factual support, as needed, in the statement of undisputed material facts. *Cf. SmithKline Beecham Corp. v. Apotex Corp.*, 439 F.3d 1312, 1319 (Fed. Cir. 2006) ("[A]rguments not raised in the opening brief are waived."), *cited in Avue Technologies Corp. v. Department of Health & Human Services*, CBCA 8087(6360)-REM, et al., 24-1 BCA ¶ 38,617, at 187,715. Because DOT did not file the

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[8] We do not question the Government's ability to raise new justifications for a default termination in a procedurally proper manner. *E.g.*, *Kelso v. Kirk Brothers Mechanical Contractors, Inc.*, 16 F.3d 1173, 1175 (Fed. Cir. 1994).

[9] JITA responds substantively to DOT's arguments about the concrete quality but asserts, without citing evidence, that its experts did not know they should address the procedure for ordering concrete removal as a separate issue.

complaint it now seems to wish it had filed and does not justify a constructive amendment, we limit our review to the claim that DOT pleaded, i.e., that the termination was proper because JITA did not achieve the final completion date.

There is another good reason not to allow DOT to belatedly and constructively amend its complaint to introduce the issues of concrete removal and adequate assurances: DOT can still pursue those issues at a hearing. Because DOT may rely on the contract's completion date, the burden shifts to JITA to show that its failure to finish on time was excused. *E.g.*, *Decker & Co. v. West*, 76 F.3d 1573, 1580–81 (Fed. Cir. 1996); *Prime Tech Construction LLC v. Department of Energy*, CBCA 6682, et al., 22-1 BCA ¶ 38,035, at 184,719–20 (2021), *motion for reconsideration denied*, 21-1 BCA ¶ 37,839, *motion for full Board consideration denied*, (July 2, 2021), *appeal dismissed*, No. 21-2179 (Fed. Cir. Oct. 28, 2021). A substantial part of JITA's defense to the termination will need to be to show that the dispute over concrete quality that essentially halted the work in mid-2021 was not JITA's fault, such that its failure to make substantial progress was excusable and its responses to DOT were reasonable. If DOT refutes that defense and shows that JITA was at fault for the work stoppage, DOT may show that JITA's untimeliness was unexcused despite the explanations JITA offered. *E.g.*, *Morganti National, Inc. v. United States*, 49 Fed. Cl. 110, 132–33 (2001), *aff'd*, 36 F. App'x 452 (Fed. Cir. 2002). The dispute about concrete acceptance remains at the heart of the case for further development.

We mention going to a hearing because DOT fails to show that we can resolve issues of responsibility for project delay on summary judgment. Because JITA bears the burden of proof as to excusable delay, DOT, having shown the enforceability of the completion date, could prevail by "simply point[ing] out the absence of evidence" to support JITA's claims for extensions of time. *Simanski v. Secretary of Health & Human Services*, 671 F.3d 1368, 1379 (Fed. Cir. 2012); *cf. M. Maropakis Carpentry, Inc. v. United States*, 609 F.3d 1323, 1332 (Fed. Cir. 2010) (affirming grant of summary judgment to Government in absence of certified claim for time extension as defense to liquidated damages). DOT fails, however, to establish in its motion that JITA has no evidence to support its excusability defenses. Only in a rare case can a tribunal decide construction delay claims, which often require expert testimony, without weighing evidence and resolving factual disputes. This is not a suitable case. DOT's statement of undisputed material facts establishes that JITA did not meet the contract's completion date and that DOT did not consider the delay excusable. DOT mostly summarizes correspondence. JITA, for its part, cites expert opinions in its statement of genuine issues that suffice to explain that questions of fault are triable. Further, DOT includes no support in its statement of undisputed material facts for assertions it makes in its briefs that certain correspondence did *not* occur—such as when DOT asserts that JITA did not submit time impact analyses to justify more time to perform. The appeal file contains more than 3000 exhibits. DOT cites a few dozen of them. DOT fails to show pursuant to

Rule 8(f) that no disputes of fact exist as to whether JITA has valid excuses for missing the completion deadline or has triable claims for delay.[10]

The Contract Provided for Disincentive Deductions and Liquidated Damages

DOT also seeks summary judgment as to CBCA 7675, in which JITA seeks to recoup amounts claimed by DOT for late performance. "The assessment of liquidated damages is a government claim, for which respondent has the burden of proof." *Duggirala v. General Services Administration*, CBCA 463, 07-1 BCA ¶ 33,489, at 165,998. We see no reason not to apply the same standard to "disincentive deductions." In its certified claim, which we designated as the answer in the appeal, JITA asserts as defenses, among other things, that "assessment of [both liquidated damages] and disincentives was wrong because the contract failed to include [a liquidated damages] clause that complied with the [Federal Acquisition Regulation (FAR)] or clearly identify the amount of [liquidated damages], or whether disincentives should be assessed." JITA's claim further alleges—in reliance on the statement in the contract that "[i]f Schedule A only is awarded, the disincentive deductions will be in addition to . . . liquidated damages"—that "[s]ince Schedule A was not the only award, disincentives should not have been assessed."

DOT asks us to rule, among other things, that the clauses in the contract were enforceable and that DOT properly assessed disincentive deductions for the 148 days from the interim completion date to the final completion date. We agree with DOT that the disincentive deductions provision is applicable under the terms of the contract and disagree with JITA's reading that would make the provision inapplicable. We grant DOT's motion to that limited extent but otherwise deny it because material facts are in dispute.

The contract language addressing disincentive deductions is not ideally drafted, but only one reading makes sense. *See A-Transport Northwest Co. v. United States*, 36 F.3d 1576, 1584 (Fed. Cir. 1994) ("A contract is ambiguous only when it is susceptible to two reasonable interpretations."); *Bank of America, National Ass'n v. Department of Housing & Urban Development*, CBCA 5571, 18-1 BCA ¶ 36,927, at 179,890 (2017) ("A contract may be so clear as not to require interpretation, but a mere lack of clarity on casual reading is not the criterion for determining whether a contract is afflicted with ambiguity[.]" (quoting *McCann v. McGlynn Lumber Co.*, 34 S.E.2d 839, 845 (Ga. 1945)). The contract clearly describes disincentives and liquidated damages as different things and addresses a contingency: "[i]f Schedule A only is awarded." The statement that, under this contingency, disincentives are "in addition to" liquidated damages provides useful clarification. If the

[10] This conclusion applies to all of the appeals involving delay claims to which DOT refers in its briefs.

contract were to include only schedule A and no options, the interim completion date (relating to disincentives) and the final completion date (relating to liquidated damages) would be for the same work. We read the "in addition to" proviso as adding emphasis to the parties' agreement that the contractor could in that situation incur two types of price deductions for late completion of the schedule A work alone.[11]

JITA reads the contract to mean that "disincentives apply only when Schedule A and no options are awarded." JITA's reading is conceivable but not reasonable. "[T]he intention of the parties must be gathered from the whole instrument." *Hol-Gar Manufacturing Corp. v. United States*, 351 F.2d 972, 975 (Ct. Cl. 1965). The contract states unequivocally, first, that failing to meet the interim completion date "will result in the assessment of disincentives," not merely that this may occur under some versions of the contract as awarded. Had the drafters intended the contract to mean what JITA argues it means, logic suggests they would have softened the "will result in" sentence to impose disincentives "only" if the contract included no option work. We agree with DOT, moreover, that JITA's reading would make the interim completion date pointless in exactly the situation in which it would seem to matter most—when the contractor would need to complete the schedule A work so it could start option work. While it might be conceivable to write such a contract, we would expect to see different language if the intention were that the interim completion date would matter less, and would not trigger disincentives, if (and only if) option work lay ahead in the schedule. Only DOT's reading is plausible overall. Thus, we grant DOT's motion to the extent that we deny JITA's challenge to the disincentives on this legal basis.

DOT raises no other issues relating to CBCA 7675 that we can resolve on summary judgment. JITA clarifies in opposing DOT's motion that, in addition to the legal argument just addressed, JITA's defenses to entitlement are that DOT failed to follow FAR guidance designed to ensure that liquidated damages approximate "the estimated daily cost of Government inspection and superintendence," 48 CFR 11.502(b) (2020), and that the disincentives and liquidated damages were unlawful penalties because they bore no "reasonable relation to any probable damage which m[ight] follow a breach." *Kothe v. R.C. Taylor Trust*, 280 U.S. 224, 226 (1930). DOT makes a battery of arguments to support its entitlement. These include that (1) the validity of the disincentives and liquidated damages must be resolved between JITA and its surety, from whom DOT collected the money; (2) JITA surrendered the right to object to both types of price deductions by not protesting or seeking clarification before contract award; and (3) the table of liquidated damages in the contract "represents a reasonable estimate" of DOT's actual damages. DOT fails, however, to discuss the facts on which it bases these arguments in its statement of undisputed material

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[11] Admittedly, we are effectively reading the word "if" in the phrase "[i]f Schedule A only is awarded" to mean "even if." We still think this is the right interpretation.

facts. *See* Rule 8(f)(1) (such statement "shall set forth facts supporting the motion"). Accordingly, we deny the rest of DOT's motion as it relates to CBCA 7675 for lack of support. *See Mingus Constructors*, 812 F.2d at 1390 ("The moving party bears the burden of establishing the absence of any genuine issue of material fact[.]"); *Wu & Associates, Inc. v. General Services Administration*, CBCA 6760, 21-1 BCA ¶ 37,965, at 184,383 (non-movant's burden to show genuine and material disputes of fact attaches "when a motion for summary judgment is properly supported").

Decision

We grant DOT's motion for summary judgment in part, as to the interpretation of the contract's disincentive deductions provision. We otherwise deny both parties' motions for summary judgment.

Kyle Chadwick
KYLE CHADWICK
Board Judge

We concur:

Erica S. Beardsley
ERICA S. BEARDSLEY
Board Judge

Marian E. Sullivan
MARIAN E. SULLIVAN
Board Judge