UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

RESPONDENT'S MOTION FOR PARTIAL SUMMARY JUDGMENT
GRANTED IN PART: November 21, 2025

CBCA 7147, 8110

WILLIAMS BUILDING COMPANY, INC.,

Appellant,

v.

DEPARTMENT OF STATE,

Respondent.

Kevin M. Cox of Camardo Law Firm, P.C., Auburn, NY, counsel for Appellant.

Randal W. Wax, Office of the Legal Adviser, Buildings and Acquisitions, Department of State, Washington, DC, counsel for Respondent.

Before Board Judges **LESTER**, **VERGILIO**, and **O'ROURKE**.

LESTER, Board Judge.

This appeal involves a dispute over the amount of money that appellant, Williams Building Company, Inc. (WBC), is owed under its termination settlement proposal (TSP), which it submitted after the Department of State's Office of Overseas Building Operations (OBO) terminated its construction contract for convenience.

Pending before us is OBO's motion for partial summary judgment on two issues relating to WBC's entitlement. First, OBO asks us to find that, except for settlement expenses, WBC cannot recover more than the contract price (less the portion of the contract price already paid) as part of its convenience termination settlement. Second, it wants the

Board to find that WBC would have incurred a monetary loss on this contract had it been required to complete the project rather than terminated for convenience. OBO is not asking us at this point in time to identify what the amount or scope of the loss would have been. It asks us only to find that WBC would have suffered a loss, which, if true, would preclude WBC from recovering any profit on the contract as part of its termination settlement.

It is well-settled that a terminated contractor's recovery is limited to the contract price, less the monies already paid to the contract during performance, plus settlement expenses. In addition, it is well-settled that, if a terminated contractor would have been in a loss position had it been required to complete its contract work, the contractor is not entitled to recover profit as part of its termination settlement, as provided in the relevant Federal Acquisition Regulation (FAR) clause. It is difficult to apply those basic propositions to this case at this time, though, based upon the state of the record here. Because we cannot resolve all of WBC's claimed entitlements to price increases through the existing motion, we cannot define the final contract price. Further, to determine whether WBC would have incurred a loss on this contract if completed, we must know (1) the total contract price, as adjusted by any equitable adjustments to which the contractor is entitled; (2) the total costs that the terminated contractor incurred in performing the project; and (3) the total additional costs that the contractor would have incurred had it been required to complete the contract. The parties disagree on what the final contract price should be, how much WBC actually spent on the contract, and the amount that it would have cost WBC to complete the project. Although, as discussed below, we can dispose on summary judgment of some of the claimed contract price increases that WBC is pursuing, we cannot identify the precise contract price that will be input into the loss formula until all of WBC's pending arguments regarding actionable changes are resolved. Further, we have no basis for resolving on summary judgment the parties' disagreement as to how much WBC incurred in working the project or how much it would have cost WBC to complete contract performance.

OBO tells us that we need not precisely define contract price or cost to complete because, even if we accept WBC's numbers, WBC would still have been in a loss position based upon the costs that it alleges it incurred during performance. Applying various combinations of numbers representing a possible final contract price, costs incurred, and cost to complete, we cannot see how OBO's assertion is correct. Although some combinations would result in a loss contract, others would not. There is simply too much uncertainty in the numbers for the Board to make determinations on summary judgment. Once the parties present sufficient evidence to allow the Board to define the proper final contract price, the costs that WBC incurred during performance to perform, and the costs that WBC would have incurred to complete the job, it will be readily apparent whether WBC is entitled to recover profit as part of its termination settlement.

Although, below, we address and resolve two sets of costs that WBC claims should be used to increase its contract price, we otherwise deny OBO's motion for partial summary judgment pending further development of the record.

Background

I. The Contract

On June 15, 2016, OBO awarded firm-fixed-price contract no. SAQMMA-16-C-0155 (contract) to WBC in the amount of $14,714,824. Appeal File Exhibit 1 at 2.[1] Under the contract, WBC was to perform a tenant retrofit of two floors of an office building in Wuhan, China, which was expected to serve as the United States Consulate, with completion anticipated by June 10, 2018—that is, within 488 calendar days from the issuance of the notice to proceed. *Id.* at 1 (box 11). Through bilateral contract modifications executed during the course of contract performance, the parties agreed to time extensions for WBC to complete the contract work and to several increases in the contract price.

The contract contained various standard FAR clauses, including FAR 52.243-4, "Changes (JUN 2007)" (48 CFR 52.243-4 (2016)) and FAR 52.249-2, "Termination for Convenience of the Government (Fixed-Price) (APR 2012)" (adopting the "Alternate I (SEP 1996)" version of subsection (g) of FAR 52.249-2). Exhibit 2 at 94, 96.

II. WBC's Claim in an Earlier Related Appeal (CBCA 6650)

Beginning in late November 2018, WBC submitted what became a series of separate, but somewhat overlapping, requests for additional monies under the contract that have been discussed in some detail in a prior Board decision in a related appeal, CBCA 6650, with which CBCA 7147 was, at one time, consolidated. *See Williams Building Co. v. Department of State*, CBCA 6650, et al., 23-1 BCA ¶ 38,328, *aff'd*, No. 2023-2337, 2025 WL 2057994 (Fed. Cir. July 23, 2025). Specifically, WBC submitted proposed change order (PCO) 075 on November 28, 2018, requesting an additional time extension of 137 days for alleged government-caused delays (beyond the 204 days granted in an earlier contract modification,

---

[1] All exhibits are found in the appeal file, unless otherwise noted. The page numbers cited are the Bates numbers on the exhibits. With regard to Exhibits 140, 141, and 142, OBO filed two sets of those exhibits with the Board—one set submitted on July 26, 2021, and another on August 2, 2021—that use different Bates numbers; in citing to the page numbers in those exhibits, we use the Bates numbers stamped on the July 26, 2021, submission.

no. 08 (mod-08)) and an equitable adjustment of $1,353,683.35. Exhibit 140 at 22612. It asserted that it "has been prevented from mitigating the remaining [137] days of excusable/compensable Government delays" because "of the continued issuance of numerous additional changes issued after the stated scope of Mod 008 of all Government caused delays up through January 31, 2018, and the Government's active interference with WBC's operations," which it claimed "is the cause of this time extension request and request for reimbursement." *Id.* at 22613. Subsequently, WBC submitted a revised updated version of PCO 075, increasing the number of days of delay being claimed for which it believed OBO to be responsible and raising the monetary portion of its request for an equitable adjustment to $1,959,993.68. Exhibit 141 at 22769.

Parallel with PCO 075 and its updates, WBC submitted a separate request for an equitable adjustment (REA) to the OBO contracting officer on November 29, 2018, alleging entitlement to monetary damages totaling $2,360,246.34, which WBC alleged resulted from OBO's breach of, or cardinal change to, the contract; labor costs arising from OBO's interference with the performance of WBC's subcontractor, Huashi No. 6 Construction Co. Ltd. (Huashi); and the unreasonable amount of time that OBO took to respond to WBC's requests for information (RFIs). Exhibit 36. On February 8, 2019, WBC converted the REA (but not PCO 075) into a certified claim (the breach of contract claim). Exhibit 47 at 534.

Subsequently, on March 6, 2019, WBC submitted what it called an "updated" version of the February 8, 2019, breach claim that added PCO 075 into the breach of contract claim, increased its claimed costs, and increased the number of delay days being sought. Exhibit 47 at 534, 538. Two months later, on May 6, 2019, WBC formally withdrew its certified claim (Exhibit 61 at 860) and three days after that, on May 9, 2019, submitted two separate certified claims to OBO. The first one was for a 341-day time extension (to add to the 204-day extension previously granted through mod-08) and time-related cost adjustments described in PCO 075. Exhibit 62 at 862-64. The second one served as a "resubmission . . . to update costs for the cardinal change/breach of contract claim only." Exhibit 63 at 1091. On August 13, 2019, the OBO contracting officer issued a single consolidated decision denying both of the May 9, 2019, certified claims. Exhibit 66.

Effective September 28, 2019, the parties settled WBC's "delay impact" claim for time delays (PCO 075), as well as a separate claim for customs storage fees, in bilateral modification P00020 (mod-20), with OBO agreeing to pay just under $5 million and to extend the contract's substantial completion deadline to February 29, 2020, with the following justification:

> This [request for contract action (RFCA)] is for time delays experienced on the project related to design changes and a project shutdown caused by security

> concerns when the general contractor changed their major local subcontractor. The contractor has three open certified legal claims related to customs storage fees, time delays, and cardinal changes to the contract. This RFCA represents a partial settlement of the first two of these claims. Time delays compensated by this RFCA are related to the following changes during construction. (This RFCA addresses PCO 067 Storage costs related to customs warehousing of critical materials – $185,663.90. PCO 075 Additional Time related Costs – $4,578,004.66. [Total: $4,763,668.56]. Bond Cost for the preceding of $235,657.17 to cover contract extension to new end date of 29 February 2020. [Grand total: $4,999,325.73].

Exhibit 22 at 312-13. Mod-20 also contained the following release:

> **PCO 075 – Time Extension**
> Scope of Work: Period of performance is extended from January 1, 2019 up through February 29, 2020. 358 days are compensable, 67 days non-compensable. (425 days total).
> Amount: $4,813,661.83 — ($4,578,004.66 extended contractor costs + $235,657.17 bond costs) (No VAT)
> Time Extension: None
>
> **Contractor's Release**
> In consideration of the modification agreed to herein as a complete equitable adjustment in the amount of $4,999,325.73, WBC hereby releases the Government from any and all liability for further requests for equitable adjustments, claims or demands attributable to the facts or circumstances set forth in WBC's above-referenced PCOs.

Id. at 315. The parties did not resolve, and expressly left open for further negotiation, WBC's breach of contract claim. *Id.* at 313.

On November 8, 2019, WBC filed with the Board an appeal of "the portion of the Contracting Officer's Final Decision dated August 13, 2019, . . . denying its Claim, as amended, for breach of contract/cardinal change/defective specifications/breach of implied duty of good faith and fair dealing." The Clerk of the Board docketed that appeal as CBCA 6650. WBC indicated in its notice of appeal that "[t]his appeal does not include the items negotiated and settled between the parties in Bilateral Modification No. P00020 in the amount of $4,999,325.73 (PCOs 067 and 075), which are specifically excepted out of this appeal."

III. Termination of WBC's Contract for Convenience

By letter dated February 28, 2020, soon after issues in the Wuhan area relating to COVID-19 had become well-known, the OBO contracting officer advised WBC that, effective immediately, the contract was being terminated for the Government's convenience pursuant to FAR 52.249-2 (APR 2012) and 52.249-2 Alt 1 (SEP 1996). On the date of termination, the total contract price, including price increases reflected in four separate modifications (mod-07, mod-08, mod-20, and mod-23) was $28,774,587.30. Exhibit 406 at 24049; *see* Exhibit 22 at 315.

As of the date of termination, WBC had invoiced and been paid a total of $27,514,848.49 under the contract, leaving an available contract balance of $1,259,738.81 under the fixed-price contract (subject to any additional equitable adjustment upon which the parties might agree or that the Board might award in CBCA 6650 or elsewhere).

On or about July 9, 2020, WBC submitted a total-cost TSP in the amount of $8,754,863.48 in accordance with FAR part 49, with supporting documentation. The quantum calculation was based upon WBC's claim of entitlement to $29,706,205.02 in pre-termination contract performance costs (inclusive of a 10% markup for general and administrative (G&A) expenses); $5,676,596.20 in profit (at a rate of 20%) on certain costs; and $264,721 in settlement and continuing expenses.

WBC converted its TSP to a claim (the TSP claim) by letter dated August 21, 2020, and demanded a contracting officer's final decision.

On June 15, 2021, WBC filed with the Board a notice of appeal of the contracting officer's "deemed denial" of its TSP claim, which the Clerk of the Board docketed as CBCA 7147.

On October 22, 2021, WBC provided the OBO contracting officer with an updated quantum calculation for its TSP, increasing the total sought from $8,754,863.48 to $9,283,068.50. Exhibit 318. During the course of these appeals, WBC has, several times, revised the dollar amounts that it alleges represent its incurred performance costs for the project and the estimated costs that it would have incurred had it been required to complete the project.

IV. Resolution of CBCA 6650

By decision dated April 26, 2023, the Board granted OBO summary judgment on WBC's claim in CBCA 6650. *See Williams Building*, 23-1 BCA at 186,131. The Board

found that, because WBC had agreed in a bilateral modification to add the changed work to its contract and was compensated for that change, it could not validly argue that it was entitled to another contract price increase for a "cardinal change" for extra-contractual work. The Board denied WBC's remaining cost increase requests because WBC failed to present any evidence to support its damages claims.

WBC appealed the Board's decision in CBCA 6650 to the Court of Appeals for the Federal Circuit. On July 23, 2025, the Federal Circuit issued a decision affirming the Board's decision in CBCA 6650. *Williams Building Co. v. Secretary of State*, No. 2023-2337, 2025 WL 2057994 (Fed. Cir. July 23, 2025).

V. Continuing Proceedings in CBCA 7147, and the Filing of CBCA 8110

Because the costs at issue in CBCA 6650 are relevant to, and overlap with, claims being made in CBCA 7147, the Board suspended proceedings in CBCA 7147 pending the Federal Circuit's decision in the appeal of CBCA 6650.[2] Before the Board suspended proceedings in CBCA 7147, OBO filed a motion for partial summary judgment, asking the Board to find that, because WBC would have performed the contract at issue at a loss, WBC is not entitled to recover profit as part of its convenience termination settlement recovery. That motion was fully briefed before the Board suspended proceedings in CBCA 7147.

During the pendency of the suspension of proceedings in CBCA 7147, WBC filed another appeal with the Board arising out of the contract at issue, which the Clerk of the Board docketed as CBCA 8110. In that appeal, WBC alleges that OBO is financially responsible for almost $1 million in additional materials costs that WBC was required to incur after OBO interfered in WBC's relationship with its subcontractor, Huashi. WBC alleges that, because of the improper interference, WBC was forced to pay Huashi twice for the same material costs on the project.[3] That claim was already a part of WBC's claimed

---

[2] At one point, the Board had consolidated CBCA 6650 and 7147. When the Board denied WBC's appeal in CBCA 6650, it vacated its earlier consolidation order to separate the two appeals so that CBCA 6650 could become "final" while CBCA 7147 remained pending before the Board.

[3] This claim appears closely related to a claim that WBC raised in CBCA 6650. There, WBC asserted that OBO was responsible for increased labor costs as a result of its interference in WBC's subcontractor relationship with Huashi. The Board found that, on summary judgment, it could not resolve the parties' dispute regarding whether OBO improperly interfered in that relationship, *Williams Building*, 23-1 BCA at 186,128, but held that, even if it had, WBC could not establish that it suffered any increased labor costs as a

costs in CBCA 7147, but, after the OBO contracting officer issued a final decision on WBC's separate certified claim for the materials costs, WBC filed its appeal in CBCA 8110. The Board subsequently consolidated CBCA 7147 and 8110.

Following the Federal Circuit's decision affirming the Board's decision in CBCA 6650, the Board lifted the suspension of proceedings in CBCA 7147 and 8110 and, at OBO's request, resumed review of OBO's motion for partial summary judgment.

Discussion

I. OBO's Request to Limit Recovery Based on the Contract's Price

A. The Effect of the Contract's Price on the Termination Settlement

OBO asks us to rule that "WBC's recovery in this appeal is limited as a matter of law to the terminated contract's price less Contract payments plus WBC's reasonable post-termination settlement expenses and CDA interest." Respondent's Motion for Partial Summary Judgment (Oct. 31, 2023) at 3. From a legal standpoint, OBO's statement of the law is not controversial. Following a termination for convenience, "[a]ny award . . . must be limited to items specifically allowed by the termination clause," *Kalvar Corp. v. United States*, 543 F.2d 1298, 1305 (Ct. Cl. 1976), which, in this case, "limits recovery 'exclusive of' settlement costs to 'the total contract price as reduced by (1) the amounts of payments previously made and (2) the contract price of work not terminated.'" *CTA I, LLC v. Department of Veterans Affairs*, CBCA 5826, et al., 22-1 BCA ¶ 38,083, at 184,947 (quoting FAR 52.249-2(f)). Accordingly, a contractor may "recover its actual and allowable costs of work prior to the termination, *limited to the total contract price*." *Id.* (quoting *Foremost Mechanical Systems, Inc. v. General Services Administration*, GSBCA 12335, et al., 95-1 BCA ¶ 27,382, at 136,494 n.9 (1994)); *see Maitland Brothers Co.*, ASBCA 43088, 93-3 BCA ¶ 26,007, at 129,304-05. WBC does not disagree with this general statement of the law. *See* Appellant's Opposition Brief (Nov. 11, 2023) at 9-10.

When OBO terminated WBC's contract, the contract price identified in the contract was $28,774,587.30. *See* Exhibit 406 at 24049. In its summary judgment briefing, OBO focuses exclusively on that figure as the contract price cap. OBO seemingly ignores the possibility that "[t]he contract price could be increased through previously unsettled or

---

result of the alleged interference. *Id.* at 186,128-30. OBO has not argued that the Board's resolution of the interference claim in CBCA 6650 regarding labor costs precludes WBC's pursuit of its interference claim regarding materials costs.

unasserted requests for equitable adjustment." 2 Karen L. Manos, *Government Contract Costs & Pricing* § 88:6, at 817 (2d ed. 2009); *see* Paul J. Seidman & David J. Seidman, "Maximizing Termination for Convenience Settlements/Edition II—Part I," 08-3 Briefing Papers 1, 3 (Feb. 2008) ("'Total contract price' includes any equitable adjustments to which a contractor is entitled."). "[I]t is not appropriate to apply the contract price limit to a termination settlement without giving consideration to unpriced changes and to other modifications." *Information Systems & Networks Corp.*, ASBCA 46119, 02-2 BCA ¶ 31,952, at 157,873; *see Foremost Mechanical*, 95-1 BCA at 136,494 (recognizing that equitable adjustments allow for "an adjustment to [the] contract price in negotiating convenience termination costs"); *Systems & Computer Information, Inc.*, ASBCA 18458, 78-1 BCA ¶ 12,946, at 63,138 (1977) (allowing contractor to increase the contract price cap set forth in the contract to account for changes during performance for which the Government was responsible).

WBC contends that, because of changes that occurred during performance, the current approved contract price needs to be increased for purposes of its termination settlement to reflect the dollars to which WBC would have been entitled had it completed performance. Those three sets of costs are: (1) the costs for which WBC sought recovery in CBCA 6650; (2) materials costs resulting from OBO's alleged interference with WBC's subcontractor, Huashi, which are being claimed in CBCA 8110; and (3) costs associated with three allegedly unresolved PCOs (PCO 071, PCO 073, and PCO 083).

B. WBC's Alleged Bases for Increasing the Contract Price

1. Costs Resolved in CBCA 6650

In its briefing on OBO's partial summary judgment motion, WBC claimed that it was entitled to recover $1,694,772 for the alleged OBO breaches of contract and changes that were litigated in CBCA 6650. As noted above, the Board previously resolved CBCA 6650 in OBO's favor, finding that WBC was not entitled to recover any of the monies claimed in that case. *See Williams Building*, 23-1 BCA at 186,131. When WBC filed its partial summary judgment briefing, its appeal of the Board's decision in CBCA 6650 was still pending in the Federal Circuit. On July 23, 2025, however, the Federal Circuit affirmed the Board's decision in CBCA 6650, *Williams Building*, 2025 WL 2057994, and WBC's time for seeking any further appellate review has expired.

"Res judicata or, more precisely, claim preclusion, applies when '(1) the parties are identical or in privity; (2) the first suit proceeded to a final judgment on the merits; and (3) the second claim is based on the same set of transactional facts as the first.'" *Dean v. United States Postal Service*, 328 F. App'x 651, 653 (Fed. Cir. 2009) (quoting *Ammex, Inc.*

v. United States, 334 F.3d 1052, 1055 (Fed. Cir. 2003)). Here, WBC is barred by the doctrine of res judicata from seeking any additional monies (or increasing its contract price) for costs that it was denied in CBCA 6650. *See John H. Hampshire, Inc.*, GSBCA 4860, 81-1 BCA ¶ 14,914, at 73,772 ("Parties to an appeal cannot relitigate, in a subsequent proceeding before the Board, the issues decided in an earlier decision which has become final.").

2. Increases Associated With Allegedly Unresolved PCOs

WBC asserts that it submitted three PCOs during contract performance that OBO never resolved and that the unresolved PCOs entitle it to add $528,319 to the contract price. Despite WBC's assertions to the contrary, it is clear from the record that all three of the PCOs were the subject of bilateral contract modifications that preclude WBC from seeking any further corresponding contract price increases.

PCO 071, dated October 8, 2018, "notif[ied] [the OBO contracting officer] of project delays which may result in completion of the Project after the Contract Time" caused by OBO's alleged delay in responding to a request for information about the placement of emergency lighting on the fifth and sixth floors of the building. Exhibit 635 at 1; *see* Exhibit 142 at 22832. Subsequently, PCO 071 was referenced and effectively incorporated into WBC's larger time-related cost proposal in PCO 075. *See* Exhibit 142 at 22839-76. As noted above, WBC and OBO settled PCO 075 (and the time-related PCOs that pre-dated and were effectively incorporated into PCO 075) through modification P00020 on September 28, 2019, Exhibit 22 at 312-15, with a release of OBO "from any and all liability for further requests for equitable adjustments, claims or demands attributable to the facts or circumstances set forth in WBC's above-referenced PCOs." *Id.* at 315. Although mod-20 referenced PCO 075 rather than PCO 071, PCO 075 encompassed and incorporated PCO 071. Through accord and satisfaction and separately through release, WBC is barred from seeking an additional equitable adjustment or increase to its contract price based on PCO 071. *See Valcon II, Inc. v. United States*, 26 Cl. Ct. 393, 397 (1992) ("Generally, an executed bilateral contract modification that contains no reservation of rights constitutes an accord and satisfaction." (citing cases)); *Williams Building*, 23-1 BCA at 186,125 ("A release executed by a contractor will normally bar any existing claims except those reserved within the terms of the release." (quoting *Siska Construction Co.*, VABCA 3470, 92-1 BCA ¶ 24,578, at 122,607 (1991)).

PCO 073, which addressed the removal of installed pipe and reinstallation of new HVAC piping, *see* Exhibits 142 at 22872, 636 at 1-12, was a time-related claim which was later absorbed into PCO 075. *See* Exhibit 142 at 22832. PCO 075 then became the basis of a certified claim that WBC submitted to the OBO contracting officer on May 9, 2019, which

expressly encompassed the time delays that WBC alleged and for which it sought compensation in PCO 073. *See id.* at 22872-76 (expressly incorporating alleged time delays from PCO 073). WBC and OBO settled that claim through modification P00020 on September 28, 2019, Exhibit 22 at 312-15, with a release of OBO "from any and all liability for further requests for equitable adjustments, claims or demands attributable to the facts or circumstances set forth in WBC's above-referenced PCOs." *Id.* at 315. Although mod-20 referenced PCO 075 rather than PCO 073, PCO 075 encompassed and incorporated PCO 073. Through accord and satisfaction, and separately through release, WBC is barred from seeking an additional equitable adjustment or increase to its contract price based on PCO 073.

PCO 083, dated July 24, 2019, was a price proposal for additional work associated with electrical changes included in addendum 4 to the contract narrative and drawings. *See* Exhibit 637 at 1. PCO 083 was resolved through bilateral modification no. 17 on September 4, 2019. *See* Exhibit 19-1 at 31346. In that modification, the parties represented that "[f]our subject PCO's [including PCO 083] were negotiated with the Contractor on 7/24/19 under the oversight of the Contracting Officer" and that the addition of $173,000 to the contract to resolve those four PCOs was "determined to be fair and reasonable." *Id.* at 31354. The modification specifically mentioned that $40,000 of the $173,000 being added to the contract price was attributable to PCO 83. *Id.* at 31356. The modification contained the following release:

> In consideration of the modification agreed to herein as a complete equitable adjustment in the amount of $173,000.00 with no time extensions of the facts and circumstances giving rise to the above-referenced PCOs, WBC hereby releases the Government from any and all liability for further requests for equitable adjustments, except for a time extension and extended overhead costs attributable to compensable Government caused delays.

Id. WBC has released any claims to additional dollars for PCO 083, *see Williams Building*, 23-1 BCA at 186,125, and has no basis for adding additional dollars to its contract price for this resolved change.

3. WBC's Claim for Interference with Huashi

Pending before the Board in these consolidated appeals is WBC's claim for $988,643 in increased materials costs that it allegedly incurred because OBO interfered in its relationship with its subcontractor, Huashi, which effectively required WBC to pay for the same materials twice. That claim is pending before the Board in CBCA 8110, which was

consolidated with CBCA 7147. Discovery relating to that claim is continuing, and neither OBO nor WBC has presented a motion for summary judgment on that claim to the Board.

OBO's only basis for excluding any monies allegedly due under the Huashi claim is that, even though the claim is discussed in WBC's termination settlement proposal, WBC elected to submit it as a separate claim and appeal it separately (even though CBCA 8110 has now been consolidated with CBCA 7147) and that it therefore is no longer relevant to the termination settlement. That is simply untrue. In defining the final contract price, we must address and resolve all unpriced changes and equitable adjustment requests. *See Information Systems*, 02-2 BCA at 157,873. If WBC is successful in pursuing its Huashi claim, it will affect the contract price. At this stage in the proceedings, we cannot identify the correct final contract price for purposes of evaluating or limiting WBC's termination cost entitlement, other than to state that it is somewhere between the price currently identified in the contract ($28,774,587.30) and an amount no more than $988,643 above the price identified in the contract.

II. WBC's Entitlement to Profit

A. A Contractor's Inability to Recover Profit on a Loss Contract

"Perhaps the major impact of the termination for convenience procedure is that it relieves the government of the obligation of paying anticipated profits for unperformed work if it terminates the contractor's performance of the work." John Cibinic, Jr., James F. Nagle, & Ralph C. Nash, *Administration of Government Contracts* 977 (5th ed. 2016) (citing *Dairy Sales Corp. v. United States*, 593 F.2d 1002 (Ct. Cl. 1979)). "The result is that the contractor's recovery for a convenience termination under the long-form clauses [which WBC is using here] is based on incurred costs plus some reasonable amount of profit on those incurred costs[,] . . . subject to the overall limitation of the contract price." *Id.* Under Alternate I of the convenience termination provision at FAR 52.249-2, which was incorporated by reference into WBC's contract, the terminated contractor is entitled to a "fair and reasonable" sum of profit on the costs of contract work "performed before the effective date of termination." FAR 52.249-2(g)(1) & -2(g)(1)(iii) Alternate I.

Nevertheless, "[no] profit is allowed if it appears the contractor would have incurred a loss had the entire contract been completed, and a loss adjustment applies instead." 2 Karen L. Manos, *supra*, § 88:6, at 816; *see* FAR 49.203(a) ("In the negotiation or determination of any settlement, the [termination contracting officer] shall not allow profit if it appears that the contractor would have incurred a loss had the entire contract been completed."); FAR 52.249-2(g)(1)(iii) Alternate I ("[H]owever, if it appears that the Contractor would have sustained a loss on the entire contract had it been completed," the

contractor is not entitled to *any* profit, and its final termination settlement amount is to be "reduce[d] . . . to reflect the indicated rate of loss."). "A contract is a loss contract if it would have been completed at an amount in excess of the contract price." Paul J. Seidman & David J. Seidman, *supra*, at 7. "A loss adjustment reduces the contractor's termination costs, other than settlement expenses, by the percentage of loss that would have been incurred had the contract been completed." *Id.* at 3.

The Court of Claims explained that, to identify the extent to which a contractor would have made a profit or incurred a loss on a terminated contract had it been required to take it to completion, a tribunal should compare the total contract price (as adjusted in the manner that we will discuss below) to the total cost that the contractor would have incurred if it had been required to finish the project, a figure that is identified by adding the costs that the contractor actually incurred for the work performed and the estimated additional costs that would have been necessary to complete the work:

> [I]t would seem that the most reliable method for measuring plaintiff's total cost of performance is to ascertain its direct cost of performance allocable to the portion of the work that had been completed as of termination and then to determine, by projection of that amount, its direct cost for the remainder of the work. Plaintiff's total cost of performance would hence be the sum of these figures.

Dale Construction Co. v. United States, 168 Ct. Cl. 692, 736 (1964); *see National Steel & Shipbuilding Co. v. United States*, 49 Fed. Cl. 579, 588 n.8 (2001) ("[B]y adding the cost of the work performed to the estimated cost to complete the project, one would arrive at an estimate of the total cost of the project had the contract not been terminated. Next, the parties would determine the ratio of profit or loss by comparing the estimate of the total cost to the price of the contract, arriving at a profit or loss adjustment. This ratio would then be applied to the cost of the work performed to determine the actual profit or loss to which the contractor should be entitled."); FAR 49.203(c) (identifying the total-cost method loss adjustment calculation, which requires "multiplying the remainder by the ratio of (i) the total contract price to (ii) the remainder plus the estimated cost to complete the entire contract"); 2 Karen L. Manos, *supra*, § 88:6, at 816-17 (describing FAR 49.203(c) formula); Walter F. Pettit & Carl L.Vacketta, "Convenience Terminations: Selected Problems," 90-12 Briefing Papers 1, 5 (Nov. 1990) (providing example of how to apply the loss adjustment calculation under the total-cost method pursuant to FAR 49.203(c)).

Accordingly, to show that WBC would have been in a loss position had it been required to complete this contract, OBO must identify three numbers:

(1) the contract price for this project (as adjusted in the manner discussed above);
(2) WBC's total incurred costs for the work performed prior to termination; and
(3) the cost, which will have to be estimated, that WBC would have incurred had it been required to complete the contract work.

See FAR 49.203(c); *see also R&B Bewachungs GmbH*, ASBCA 42214, 92-3 BCA ¶ 25,105, at 125,158 (holding that the Government bears the burden of proving a loss adjustment). We address below the extent to which OBO has satisfied that burden for purposes of summary judgment.

B. The Contract Price

For the reasons discussed above, we cannot identify whether the $28,774,587.30 contract price identified in the last bilateral contract modification is the proper figure to use for the loss calculation, given that any recovery by WBC on its pending $988,643 Huashi claim would entitle WBC to an increase in that figure. In its summary judgment briefing, OBO seemingly ignores the possibility that the contract price could increase. *See* Respondent's Reply Brief (Dec. 15, 2023) at 17. We make no judgments here on the viability of WBC's Huashi claim.

C. WBC's Incurred Performance Costs

In its expert rebuttal report, submitted to the Board in July 2023, WBC asserted that its total project costs were $25,402,722, which, after adding a 10% markup for general and administrative (G&A) expenses, creates a total for project costs incurred of $27,919,857. *See* Exhibit 564 at 716, 759 (WBC expert rebuttal report). In its response to OBO's summary judgment motion, WBC used a slightly higher dollar figure in identifying its total incurred performance costs: $28,395,113. Appellant's Opposition Brief at 21.

OBO disagrees with WBC's cost calculation, asserting that WBC's claimed project costs include "duplicated items, improper or inaccurate amounts, rates in excess of actual costs, amounts not incurred or paid by WBC, and items not supported by provided information." Exhibit 556 at 29953 (OBO expert report). OBO's expert witness opines that WBC's actual incurred costs were only $23,687,825, which, with a G&A markup, would

create a total incurred project cost of $24,852,662. *See id.* at 29954.[4] Nevertheless, in its summary judgment briefing, OBO raised the possibility that WBC had purported to "defer" certain bonding costs to a future date so that it could artificially lower its incurred performance costs, *see* Respondent's Reply Brief at 24, suggesting that the incurred performance costs should be higher than OBO's expert indicated.

We cannot, on summary judgment, resolve any of the questions about the amount of WBC's incurred performance costs.

D. Estimated Cost to Complete the Contract

"In determining the estimate to complete, all expected costs are considered, including the costs the contractor would have had to expend to correct defective performance had the contract not been terminated." John Cibinic, Jr., James F. Nagle, & Ralph C. Nash, Jr., *supra*, at 1003-04.

The Board is unclear as to what OBO estimates the cost to complete the contract to be. In its prior submissions to the Board, through its expert witness report, OBO indicated that the cost to complete was $2,147,208, *see* Exhibit 556 at 29961, 30011, and that the cost to correct defects in the work that WBC already performed—costs that WBC presumably would have to incur had it completed the project—total an additional $1,232,947. *Id.* at 29962, 30013. Yet, in its summary judgment briefing, OBO mentioned only the $1,232,947 figure, *see* Respondent's Reply Brief at 14, leaving the Board unable to ascertain OBO's ultimate cost-to-complete position. For its part, WBC tells us that the "Contract Price for Unperformed Work," which represents the value of that work, is $788,849, *see* Appellant's Opposition Brief at 14-15, while the "Estimated Cost to Complete" is $650,632, *id.* at 21, although WBC has used different numbers at other times in this litigation. The Board has no basis at this time for picking among the parties' various numbers or even understanding how they were created or calculated.

E. The Insufficiency of Information to Allow for Summary Judgment

Ultimately, OBO asks the Board to grant partial summary judgment in its favor that WBC's "contract be adjudged to be a 'loss contract' and that its claims for profit be denied." Respondent's Reply Brief at 25. To do so, we would have to make factual determinations

---

[4] We calculated this number by adding together the OBO expert's figures of WBC costs for direct material, direct labor, labor burden, other direct costs, and G&A expense. *See* Exhibit 556 at 29954.

regarding various combinations of numbers that we would lump together in different ways, which would potentially allow us to make some advisory rulings about which combinations of numbers would put the contract into a loss position and which would not. That is not an appropriate basis for a summary judgment ruling. *See Chanhassen Venture, Ltd. v. Department of Commerce*, CBCA 789, 08-1 BCA ¶ 33,826, at 167,424 ("The purpose of summary relief is to resolve a matter on the law where there are no specific factual issues which could vary the result."). Because we cannot define the final contract price, the costs that WBC incurred during performance, or the estimated cost to complete, we decline to resolve the loss and profit issue until such time as we can identify those amounts. *See Intelligent Investments, Inc. v. United States*, 178 Fed. Cl. 143, 155 (2025) (declining to rule on the availability of profit on a termination settlement "until all other costs are adjudicated").

Decision

For the foregoing reasons, OBO's motion for partial summary judgment on WBC's ability to recover profit as part of its termination settlement is **GRANTED IN PART**. WBC will not be allowed to increase the contract price for purposes of calculating its termination settlement by the dollars sought but denied in the now-final CBCA 6650 appeal or sought through PCOs 071, 073, or 083. OBO's motion for partial summary judgment is otherwise **DENIED**.

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

We concur:

Joseph A. Vergilio
JOSEPH A. VERGILIO
Board Judge

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