

Board of Contract Appeals

General Services Administration
Washington, D.C. 20405

MOTION TO DISMISS DENIED:
MOTION FOR SUMMARY RELIEF GRANTED IN PART:
October 6, 2003

GSBCA 16079

MARUT TESTING & INSPECTION SERVICES, INC.,

Appellant,

v.

GENERAL SERVICES ADMINISTRATION,

Respondent.

Bradley Alan Rush, Silver Spring MD, counsel for Appellant.

Gerald L. Schrader, Office of General Counsel, General Services Administration,
Washington, DC, counsel for Respondent.

Before Board Judges **DANIELS** (Chairman), **BORWICK**, and **NEILL**.

NEILL, Board Judge

This case concerns three claims brought by appellant, Marut Testing & Inspection Services, Inc. (Marut). On June 30, 1993, the General Services Administration (GSA) awarded Marut a contract for the services of a construction inspection specialist (CIS). Marut contends that under the Minimum/Maximum Contract and Order Limitation clause of that contract it is entitled to a guaranteed firm fixed fee for the contract's base year and for two option years as well.

In a single decision, the contracting officer has denied entirely the claim relating to the base year of the contract. He has admitted limited liability with regard to the second and third year of contract performance but has withheld payment of that amount in partial satisfaction of an amount said to be owed to GSA by appellant on a different contract. Marut appeals from that decision.

GSA has brought a motion for summary relief arguing that, as a matter of law, the appeal should be denied. Alternatively, GSA argues that we should dismiss this case for lack

of jurisdiction because the claim which appellant now contends to be the subject of this appeal is essentially different from that which was the subject of the contracting officer's decision from which appeal was initially made. For the reasons set out below, we deny the motion to dismiss and grant in part the Government's motion for summary relief.

Background

Based upon material already included in the record for this case such as the request for proposals (RFP), the contract itself, Marut's original claims, the contracting officer's decision, appellant's notices of appeal, the pleadings of the parties, and the statements of uncontested facts filed by counsel for the parties, we make the following findings, by way of background, of what we conclude to be uncontested facts.

Marut's Contract

1. The RFP to which Marut responded and which ultimately led to award of a contract to Marut was issued by GSA's Design and Construction Contracts Branch in New York City. Appeal File, Exhibit 25 at 20.

2. This RFP had the following provision regarding the subject matter of the intended contract:

SUBJECT: Construction Inspection Specialist Services (CIS) on as needed basis for a term of one year under a firm fixed price, indefinite deliver[y] contract for projects located in the State of New Jersey, Counties of: Bergen, Essex, Union, Morris, Passaic, Hudson, Middlesex and Monmouth.

1. The following Bid Schedule is for CIS personnel to perform all the services as required under the Scope of Work
2. The entire Bid Schedule (Base Year including Option 1, 2, 3 & 4) must be responded to in full. Any partial submission will be considered nonresponsive to the solicitation.
3. The hourly rate shall include applicable markups for overhead and profit. . . .
4. The CIS shall furnish construction inspection services at various construction sites throughout the life of this contract.

The amount of time by discipline required for each project will be specified later by work order. The hours estimated for all projects are as follows:

Appeal File, Exhibit 25 at 23.

3. The five bid schedules or offeror sheets which follow the above-quoted provision of the RFP listed in a column on the left side of each sheet six inspector disciplines, namely:

General Construction Engineer Inspector, Mechanical Engineer Inspector, Electrical Engineer Inspector, Structural Engineer Inspector, Asbestos Abatement Inspector, and Elevator Inspector. Reading across the page from left to right, one saw after each discipline the number of regular and overtime hours involving that discipline which the Government estimated as possibly being required for all projects. To the right of these estimates was a space for the offeror to enter an hourly rate and then, after that entry, a total price based on the multiplication of the listed hourly rate by the Government's estimated hours for that discipline. The five offeror sheets provided in the solicitation were intended to cover the base year and each of the four option years. The inspector disciplines and hourly estimates shown on the sheets were the same for each of the five years. At the bottom of each sheet was a space for the "Total Evaluated Offer Price" for the year in question. On the bottom of the schedule containing the offered hourly rates for the fourth option year was an additional space for the "Grand Total Evaluated Offer Price for Base Year, Option 1, 2, 3, and 4." Appeal File, Exhibit 25 at 24-28.

4. Section M of the RFP had the following provision:

Award will be made to that responsive, responsible offeror whose offer is determined to be among those technically acceptable and who submits the lowest grand total evaluated offer price for Base Year and Option[s] 1 thru 4. The government will not be obligated to exercise Options 1 thru 4.

Appeal File, Exhibit 25 at 170.

5. The hourly rates proposed by Marut varied depending upon the type of inspection discipline involved. Nevertheless, the rates offered by Marut for each discipline did not vary from year to year. Since the estimated hours and unit prices were the same for each year, the total evaluated price listed on each sheet was likewise the same -- namely, \$155,330.50 -- and the grand total evaluated offer price appearing at the foot of the fifth sheet (option 4) was \$776,652.50. Appeal File, Exhibit 26 at 84-87, 89.

6. The Special Conditions section of the solicitation provided, in pertinent part, as follows:

I GENERAL PURPOSE AND INTENT

A. This Solicitation, which requires a firm-fixed price indefinite delivery contract, sets forth the criteria for obtaining a Construction Inspection Specialist (CIS) who shall provide the professional and technical expertise and services described in the enclosed Scope of Work, incident to construction inspection for alteration and construction projects. Services requested under the contract shall be limited by the order limitation provision of this solicitation. Under the contract, the CIS shall provide and perform such construction inspection services as are appropriate, adequate and necessary to monitor and ensure timely progress and quality of work performed by the construction contractor and its subcontractors and ensure that said contractors perform in full compliance with all the terms and conditions of the construction contract.

....

III CONTRACT TERM

A. Work Orders under this contract may be issued by the contracting Officer [sic] at any time during the one-year period of this contract, provided that the total ordering limitation for the one-year period if [sic] not exceeded. Actual performance of work may extend beyond the one-year period.

B. In accordance with the clause entitled "OPTION(S)", the term of this contract may be extended for four (4) additional 1-year periods.

IV OPTION(S)

A. At the option of the Government, notice of exercise shall be given 60 days before the anniversary date of contract, and based upon satisfactory performance, the contract term may be extended as follows:

1. For a second one-year period (1st Option Year)
2. After satisfactory performance during the second one-year contract period (1st Option Year), the contract term may be extended for a third one-year period (2nd Option Year).
3. The same process as outlined in clause[s] 1 & 2 above shall be follow[ed] for extending the contract for a forth [sic] and fifth 1 year period (3rd and 4th Option Years).

B. The contract will not be extended or renewed after the fifth one[-]year contract period (4th Option Year).

C. Funds are not presently available for award of Work Orders under this contract beyond the initial one-year period. The Government's ability to award new Work Orders beyond this date is contingent upon the availability of appropriated funds from which payment can be made.

V WORK ORDERS

A. The sole ordering activity for this contract shall be the Contracting Officer within the General Services Administration, Region 2, Design and Construction Contracts Branch, 2PPC.

B. On an as needed basis, the Contracting Officer will issue a Work Order for a particular project for performing the services as selected from the Scope of Work, Construction Inspection Specialist, Technical Requirements (Appendix "A").

....

D. No services shall be performed under this contract until a written Work Order is issued by the Contracting Officer reflecting the total number of hours by discipline for services selected and as agreed to by the CIS and the Contracting Officer.

VI MINIMUM/MAXIMUM CONTRACT AND ORDER LIMITATION

A. The Government's intended order(s) and the CIS's obligation to furnish services under the contract as a whole shall not exceed 125 percent of the total evaluated bid price; the minimum orders shall be at least ten (10) percent of the evaluated bid price.

B. All services required under an authorized Work Order shall be obtained from the CIS at the applicable unit price(s) or hourly rate(s) established by this contract, in whatever quantities required, except that cost of the quantities ordered shall not exceed the ordering limitation established for this contract. Hourly wage rates will be adjusted only when and as required by law.

. . . .

D. The total estimated hours for each year of this contract are shown elsewhere in this contract. No guarantee is given that any specific quantity will be purchased except as noted in paragraph (A) above.

. . . .

IX FEE PAYMENT AND UNIT PRICES

A. Fee

1. The Government shall pay the CIS a cumulative fixed fee for all services and Materials outlined in this contract within the limitations of Paragraph VI above. The actual fee will be established by subsequently issued Work Orders.

. . . .

B. Payment

1. STANDARD SERVICES

The CIS will be paid per month for the actual hours worked by the staff, in accordance with the Work Order. . . .

2. SPECIAL SERVICES

The CIS will be paid either on a monthly basis or upon completion of such services, as indicated in the Work Order.

3. SHOP DRAWING-REVIEW AND DRAFTING SERVICES

The CIS will be paid either on a monthly basis or upon completion of such services, as indicated in the Work Order.

Appeal File, Exhibit 25 at 41, 43-45, 47-48. These solicitation provisions are incorporated by reference into the contract. Id., Exhibit 27 at 1 (block 18). The same provisions are also set out expressly in the contract. Id. at 105, 107-09, 111-12.

7. The three basic types of service mentioned immediately above are described in greater detail in the contract's scope of work provision. Under "Standard Services," several types of activity are described. They include such tasks as observing the performance and progress of the general contractor and its subcontractors to ascertain whether they are complying with plans, specifications, other requirements of their contract, and sound construction practice; reporting on any contractor's lag in progress; preparing progress inspection reports; and following through on items inspected to assure that all defects and omissions noted at final inspection are corrected or completed. Appeal File, Exhibit 27 at 118-22. "Special Services," on the other hand, are described with a brief list of examples, such as laboratory testing, serving as an expert witness, serving as a special consultant, and providing professional progress photographs. Id. at 123. The general nature of the third type of service, "Shop Drawing-Review and Submittal Review and Drafting Services," is, for the most part, clear from the title itself. Id. at 124.

8. For purposes of this decision, it is important to note that, in describing the Special Services and the Shop Drawings and Submittal Review and Drafting Services, the contract's scope of work section distinguishes between the contractor's "in-house" and "outside" capabilities. Unlike the description of Standard Services, the contract recognizes that the contractor may not possess the in-house capability of providing these particular services which the Government might require during the course of the contract. In such situations, the contract provides in pertinent part:

When such services are requested by the Contracting Officer and the CIS determines that services are beyond the CIS's in-house capabilities, the Contracting Officer shall approve the CIS's use of outside capability. The CIS shall request proposals from at least three (3) qualified sources, if that number of sources is available. The CIS shall submit to the contracting Officer [sic], for approval prior to award, originals of all proposals received along with the CIS's recommendations.

Appeal File, Exhibit 27 at 123, 126. No similar provision exists with regard to Standard Services.

9. Another contract provision, the Inspection of Services-Fixed-Price clause, provides among other things that the Government has the right to inspect and test all services called for by the contract "to the extent practicable at all times and places during the term of the contract." Appeal File, Exhibit 27 at 116.

10. After negotiation on the proposal submitted by Marut in response to the aforementioned RFP, GSA awarded a contract (the contract) to Marut on June 30, 1993. Appeal File, Exhibit 27.

Events Following Award

11. During the base year of the contract, the contracting officer issued two work orders to Marut to provide CIS services. For the services rendered on those two work orders, Marut was paid a total of \$39,796.32. Appeal File, Exhibits 4, 5; see also Respondent's Statement of Uncontested Facts ¶ 18; Appellant's Statement of Genuine Issues at 20-21.

12. In late June 1994, GSA exercised its option to extend the contract for a second one-year period (first option year). Appeal File, Exhibit 28. No work orders were issued to Marut during this first option year. Respondent's Statement of Uncontested Facts ¶ 19; Appellant's Statement of Uncontested Facts ¶ 26.

13. In early June 1995, GSA advised Marut of its intention to exercise its option to extend the contract into a third one-year period (second option year). A contract modification to that effect was signed shortly thereafter. Appeal File, Exhibit 29.

14. The parties are in disagreement over whether any work orders were issued to Marut during this second option year. Respondent contends that none were issued. Respondent's Statement of Uncontested Facts ¶ 19. Appellant denies this fact and, in support of this denial, has provided for the record copies of work orders issued during the second option year. Appeal File, Exhibit 30. Marut alleges that it performed the work called for in the work orders but that the orders were subsequently withdrawn, thus depriving Marut of the possibility of invoicing for the work. Appellant's Statement of Uncontested Facts ¶¶ 30-32.

15. GSA did not exercise its option to extend the contract into a fourth one-year period. Respondent's Statement of Uncontested Facts ¶ 11; Declaration of Joseph E. Marut II (Marut Declaration) (July 30, 2003) ¶ 63.

Marut's First Claim

16. Marut's president states that, following the expiration of the contract, he filed a claim for 125 % of the total contract value for the base year and the four option years. He further declares that he also filed an identical claim on a similar contract Marut had with GSA. The only difference in the two claims was the amount sought, the contracting officer to whom the claim was sent, and the contract number under which the claim was made. Marut Declaration ¶ 66. This other claim was denied by the contracting officer and became the subject of an appeal heard and decided by this Board in 2002. Marut Testing & Inspection Services, Inc. v. General Services Administration, GSBCA 15412, 02-2 BCA ¶ 31,945.

17. The Board's decision in GSBCA 15412 does, in fact, state that Marut's initial payment request was for 125 % of the combined prices of the base year and all four option years less amounts already paid under the contract. Marut is said to have derived the 125 %

"from special condition VI of the contract, which provided that GSA's intended orders and Marut's obligation to furnish services under the contract as a whole would not exceed 125% of the total evaluated bid price." Marut Testing, 02-2 BCA at 157,818.

18. According to respondent, the contract in relation to which the claim in GSBCA 15412 was brought was identical to the contract in this case. Respondent's Statement of Uncontested Facts ¶ 20. In commenting on this alleged fact, appellant states that it agrees with the statement except that the decision in GSBCA 15412 speaks for itself and the facts in the instant case are different from those in GSBCA 15412. Accordingly, Marut contends that the Board's factual conclusions in that case are not relevant to or conclusive in this appeal. Appellant's Statement of Genuine Issues at 21-22.

19. We have compared the contract provisions which are either summarized or directly quoted in the Board's decision in GSBCA 15412 with matching provisions of the contract in this case. Although the contract in GSBCA 15412 covered CIS services for projects located in upstate New York, we find little if any other difference in the two contracts and their provisions. In particular, we find the texts quoted from the special conditions of the two contracts to be identical -- even to the typographical errors contained in these provisions. Compare Marut Testing, 02-2 BCA at 157,814-16, with Finding 6.

Marut's Revised Claims

20. Following the Board's decision in GSBCA 15412 on August 2, 2002, Marut revised the claim it had previously submitted under the contract in the instant case. In lieu of its original claim, Marut submitted three invoices/claims. The first is dated September 30, 2002, and is identified as invoice/claim number 2000-0017-101-10. This claim is said to represent the amount due for the base year of the contract. The invoice/claim quantifies the amount said to be due for this period as follows:

Total Evaluated Bid Price, Section M	\$776,652.50
Uncontested 10% of the Total Evaluated Bid Price, Section C	\$ 77,665.25
Amount Received from this Contract Period (verified by GSA)	\$ 39,796.32
Balance Due This Invoice Statement	\$ 37,868.93

In this first invoice/claim, Marut writes that for this base period it "sustained the 'capabilities to provide the specific Construction Inspection Services required under the contract' for the guaranteed fee which did 'not exceed 125 percent of the total evaluated bid price'" Marut also states that, for the first contract period of June 30, 1993, to June 29, 1994, it was required to and did perform the services and provide the materials called for in the contract for a firm fixed-price contract amount. Appeal File, Exhibit 6 at 7.

21. Marut's second invoice/claim is dated October 1, 2002, and is identified as invoice/claim number 2000-0017-102-10. This claim is said to represent the amount due for the second contract period. The invoice/claim quantifies the amount said to be due for this period as follows:

Total Evaluated Bid Price, Section M	\$776,652.50
Uncontested 10% of the Total Evaluated Bid Price, Section C	\$ 77,665.25
Amount Received from this Contract Period (verified by GSA)	\$ 0

Balance Due This Invoice Statement

\$ 77,665.25

In this second invoice/claim, as in the first invoice/claim, Marut likewise writes that for this second contract period it "sustained the 'capabilities to provide the specific Construction Inspection Services required under the contract' for the guaranteed fee which did 'not exceed 125 percent of the total evaluated bid price'" Marut also states that, for this second contract period of June 30, 1994, to June 29, 1995, it was required to and did perform the services and provide the materials called for in the contract for a firm fixed-price contract amount. Appeal File, Exhibit 7 at 7.

22. On October 3, 2002, Marut submitted its third invoice/claim, number 2000-0017-103-10. This claim is said to represent the amount due for the third contract period. The invoice/claim quantifies the amount said to be due for this period as follows:

Total Evaluated Bid Price, Section M	\$776,652.50
Uncontested 10% of the Total Evaluated Bid Price, Section C	\$ 77,665.25
Amount Received from this Contract Period (verified by GSA)	\$ 0
Balance Due This Invoice Statement	\$ 77,665.25

As in the other two claims, Marut writes that during this third contract period it "sustained the 'capabilities to provide the specific Construction Inspection Services required under the contract' for the guaranteed fee which did 'not exceed 125 percent of the total evaluated bid price'" Marut also stated that, for this third contract period of June 30, 1995, to June 29, 1996, it was required to and did perform the services and provide the materials called for in the contract for a firm fixed-price contract amount. Appeal File, Exhibit 8 at 7.

The Contracting Officer's Decision Regarding Marut's Revised Claim

23. In a decision dated December 4, 2002, the contracting officer rejected all three of Marut's revised invoices/claims. In that decision, the contracting officer took issue with Marut's calculation of the minimum guarantee under the contract's Minimum/Maximum Contract and Order Limitation clause. Rather than calculate the ten percent minimum guarantee based upon the total evaluated bid price for the total five-year period, the contracting officer advised Marut that he read the clause as requiring that the calculation should be based on the evaluated total for the year the contract was in effect. Marut's offered price for the base year and each option year was the same, namely \$155,330.50, so the minimum guarantee for any year the contract was in effect would, therefore, be \$15,533.05. Since the Government placed orders during the base year for an amount well in excess of that figure, the contracting officer denied any liability under the Minimum/Maximum Contract and Order Limitation clause for the base year of the contract. Appeal File, Exhibit 9.

24. In his decision, the contracting officer did, however, acknowledge that the Government had failed to comply with the Minimum/Maximum Contract and Order Limitation clause during the second and third year the contract was in effect. According to the contracting officer, the Government failed to place any orders during the second and third years of the contract. The contracting officer, therefore, concluded that, as a result, Marut was entitled to recover an anticipated profit of eleven percent on the guaranteed order amount of \$15,533.05 for each year. This determination was said to be based upon the conclusion

reached by the Board in GSBCA 15412 that appellant was entitled to recover its anticipated profit based upon a similar violation of an identical provision in another contract it had with GSA. Appeal File, Exhibit 9.

25. In his decision, however, the contracting officer declined to pay Marut the limited amounts found due for the second and third years of contract performance. Instead, he advised appellant that payment would be withheld in partial satisfaction of an amount the Board found in GSBCA 15412 to have been overpaid to Marut on the contract which was the subject of that appeal. Appeal File, Exhibit 9.

Marut's Appeal of the Contracting Officer's Decision

26. Although the contracting officer issued a single decision rejecting Marut's three invoice/claims, Marut, in appealing the decision, filed an individual notice of appeal regarding each claim. Appeal File, Exhibit 10. (Notwithstanding the filing of three notices of appeal, the Board docketed the notices as a single case because only one contracting officer's decision was at issue.) Similarly, after this appeal was docketed, Marut filed separate complaints regarding each of the three claims. Both the notices of appeal and the three separate complaints, however, unlike the original three claims, dwell at some length on the three basic types of services called for in the contract. Compare Appeal File, Exhibits 6, 7, 8, with Exhibit 10 and Complaints for Claims 2000-0017-101-10, 2000-0017-102-10, and 2000-0017-103-10.

27. GSA found Marut's three complaints "neither simple nor concise nor direct." The Government, therefore, in its answer, entered a general denial of the allegations set out in the complaints. In an amended answer to these complaints, GSA further averred:

To the extent appellant was relying upon the Standard Services, Special Services or Shop-Drawing Review provisions of the contract, it has failed to state a claim inasmuch as those provisions, in themselves, do not mandate payment. The contract mandates payment only pursuant to work orders which are actually issued or, where insufficient work orders were issued, the minimum guarantee provision in the contract.

Amended Answer ¶ 18.

Marut's Expanded Claims

28. In reply to respondent's comments regarding the complexity and vagueness of appellant's claims, Marut, by letter to the Board dated June 3, 2003, submitted a series of invoices "in an effort to alleviate this problem." Attached to the letter were twelve invoices for the amounts which Marut contended were at issue in this case "for each one[-]year term contract period beginning with the base year contract June 30, 1993 through June 29, 1994 and subsequent one-year term contracts which were awarded annually and to be paid as Options (OPTION 1 effective June 30, 1994 through June 29, 1995; OPTION 2 effective June 30, 1995 through June 29, 1996; OPTION 3 effective June 30, 1996 through June 29, 1997)." Appeal File, Exhibit 17.

29. Marut's twelve invoices were grouped in the following fashion. For the contract base year and for each of three option years thereafter, Marut submitted a set of three separate invoices. The first invoice for each year was for Standard Services that Marut said were covered by the contract for the year in question. The second invoice was for the Special Services for the same period, and the third was for the Shop-Drawing and Submittal Review and Drafting Services of that year. The amounts claimed as due in each invoice were said to be firm fixed prices and the amounts sought for each year were the same -- namely, for Standard Services \$155,330.50, for Special Services \$77,665.25, and for Shop-Drawing and Submittal Review and Drafting Services \$77,665.25. The total claimed, therefore, amounted to \$1,242,644. No credit was applied for payments made on work orders issued to the contractor during the base year of the contract. Appeal File, Exhibit 17.

Discussion

GSA's Motion to Dismiss

Marut contends that the fundamental issue in this case is whether the Government breached the contract both by not ordering the minimum amounts guaranteed by the contract and by failing to issue work orders to cover all the services actually provided under the contract. Appellant's Opposition to Respondent's Motion for Summary Relief at 3. GSA argues that this claim for breach of contract damages has never been submitted to the contracting officer for decision and that we should, therefore, dismiss the case for lack of jurisdiction. Government counsel notes that the claims which were the subject of the contracting officer's decision were drafted by Marut's president, who has since stated in paragraph sixty-nine of a declaration submitted as part of these proceedings: "Not being a lawyer, I did not know that I had to claim entitlement as a breach of contract for failure to order the guaranteed minimum." Respondent's Motion to Dismiss at 2, 4.

Respondent also argues that the operative facts underlying what it contends are new claims are different from those underlying the original claims. Counsel writes that initially Marut sought compensation under the Minimum/Maximum Contract and Order Limitation clause for services that were never ordered and never performed, while now it seeks compensation for services that it says were actually performed even though they were either informally requested, i.e., without a work order, or formally requested and then cancelled. Respondent's Motion to Dismiss at 6.

We do not read appellant's original three claims as narrowly as respondent does. We agree with respondent that the claims as set out in appellant's complaints are "neither simple nor concise nor direct." The same can be said of the three claims as originally submitted. Nevertheless, we recognize that, at the time the claims and complaints were submitted, appellant was acting "pro se" and did not yet have the benefit of counsel. For this reason, we are concerned here more with appellant's intent as apparent from the wording of the claims than with the strictly technical import of the words used.

Reading the claims in this fashion, we note first that, to some degree, the Minimum/Maximum Contract and Order Limitation clause figures in each of the three

claims.¹ While the actual terms "breach" and "costs" may not appear in the claims, it is clear from the text of the claims that the individual who drafted them was convinced that the Government's failure to comply with the contract's minimum ordering requirements damaged Marut and, in particular, precluded the company from recovering the costs of sustaining the "capabilities to provide the construction inspection services required under the contract." The statement is also made in each of the three claims that Marut was required to and did perform the services and provide the materials called for in the contract. The claims, as originally filed, therefore, do not rest on the contention that services were never performed. Rather, the allegation is that, because services *were* performed and materials provided as required by the contract, the claimant is entitled to relief. From the claims, even in their subsequently amended and expanded form, it is still apparent to us that the contractor remains convinced that, through the minimum fee guarantee set out in the Minimum/Maximum Contract and Order Limitation clause, it is entitled somehow to recover various costs associated with the contract. See Findings 20-22, 26-29.

In short, we read the claims in this case as being based on a breach of the contract's minimum ordering requirements -- even if this is not expressly stated. Further, we perceive that, in bringing these claims, appellant is attempting to recover costs allegedly associated with contract performance by seeking the relief it believes is afforded the contractor through the Minimum/Maximum Contract and Order Limitation clause. We, therefore, deny the Government's motion to dismiss Marut's claims regarding the base year, option year one, and option year two.

In denying the Government's motion to dismiss, however, we consider it particularly important to clarify one matter. In his motion to dismiss, counsel for the Government argues that Marut has changed the essential nature of its original claim. He explains that the original three claims were based on the ten percent minimum guarantee provision of the contract and sought the recovery of damages incurred by reason of the Government's failure to issue work orders for that guaranteed minimum amount of work. In its opposition to the motion to dismiss, however, Marut is said to have changed the nature of these claims by stating that the ten percent cap in recoverable damages under the Minimum/Maximum Contract and Order Limitation clause is not applicable to its claim for costs. Respondent's Motion to Dismiss at 5.

¹ This appears to be true even with regard to the claim for option year two. Marut now contends that, during this third year of the contract, orders were in fact issued but subsequently cancelled. If the total of the orders allegedly issued during this third period were to exceed ten percent of the evaluated bid price (i.e., the contract's minimum ordering requirement), then arguably this would remove the claim from the ambit of the Minimum/Maximum Contract and Order Limitation clause. Documentation submitted thus far by Marut, however, indicates that these orders did not exceed \$10,582.30. Appeal File, Exhibit 30. This figure is still well below ten percent of the evaluated bid price -- regardless of whether that figure is based upon the contracting officer's or the contractor's interpretation of that term as used in the clause.

Marut has in fact recently stated that the ten percent minimum obligation mentioned in the Minimum/Maximum Contract and Order Limitation clause and the dollar amount attached to that obligation "are irrelevant to Marut Testing's claim." Appellant's Statement of Genuine Issues at 15. It is not altogether clear to us what is intended by this statement -- particularly in view of what is written in paragraphs 69 to 82 of the declaration of Marut's president, which are cited in support of the statement. If the intent of the statement is to say (as counsel for the Government believes it says) that the ten percent cap in recoverable damages under the Minimum/Maximum Contract and Order Limitation clause is not applicable to Marut's claims, then we would agree that the basic nature of the original claims has in fact changed.

It must be clearly understood here that we are denying GSA's motion to dismiss because we do not believe the basic nature of these claims has changed. As already stated, we find the three claims, as originally submitted and as later expanded by the company's president, are tied to the contract's Minimum/Maximum Contract and Order Limitation clause. This is the contract provision under which Marut has sought, and, as we understand, continues to seek relief. We understand the quantum of Marut's claim to be determined by its reading of the clause. (Whether that reading is correct or not is a matter for discussion later in this decision.) We further understand that Marut seeks this sum certain for purposes of defraying costs which it claims to have incurred under the contract but for which it has received no compensation. Marut's claims, therefore, as we understand them, are not technically speaking claims for costs but rather claims for the amount to which Marut believes it is entitled under the Minimum/Maximum Contract and Order Limitation clause. In entering the contract, the parties agreed to a specific limit under the clause in the event the Government breached its minimum order requirement. If Marut's claims are brought under this clause -- and in denying the Government's motion to dismiss, we most definitely are assuming that they are -- then any cap imposed by this clause remains in effect. We have no intention of permitting appellant in this proceeding to expand its claim for relief beyond what is afforded under that provision.

There is, of course, obvious disagreement between the parties as to how the Minimum/Maximum Contract and Order Limitation clause should be interpreted and applied, as well as whether it can even be used to recover certain costs the contractor has allegedly incurred. This, however, leads us into the actual merits of the case and respondent's motion for summary relief.

Respondent's Motion for Summary Relief

It is well established that resolving a dispute on a motion for summary relief is appropriate where no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247 (1986); Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986); Giesler v. United States, 232 F.3d 864, 869 (Fed. Cir. 2000); Olympus Corp. v. United States, 98 F.3d 1314, 1316 (Fed. Cir. 1996); Dairyland Power Cooperative v. United States, 16 F.3d 1197, 1202 (Fed. Cir. 1994); Copeland Enterprises, Inc. v. CNV, Inc., 945 F.2d 1563, 1565-66 (Fed. Cir. 1991); Mingus Constructors, Inc. v. United States, 812 F.2d 1387, 1390 (Fed. Cir. 1987); Armco, Inc. v. Cyclops Corp., 791 F.2d 147, 149 (Fed. Cir. 1986). A fact is material if it might

significantly affect the outcome of the suit under the governing law. Anderson, 477 U.S. at 248. Any doubts regarding such factual issues must be resolved in favor of the non-moving party, in whose favor all justifiable inferences are to be drawn. Id. at 255.

Marut's claims in this case, as originally presented to the contracting officer and as subsequently explained by the company president to alleviate any existing confusion, are grounded on two assumptions which we find to be in conflict with the contract when read as a whole and, therefore, fallacious as a matter of law. The first assumption is that, because the contract is said to be fixed-price, the contractor is entitled to an annual fixed-price payment based upon some percentage of the total evaluated bid price.² The second incorrect assumption is that the term "evaluated bid price" as used in the Minimum/Maximum Contract and Order Limitation clause means the sum of the total evaluated bid prices for the base contract year plus all four option years (\$776,652.50).

We turn to the first assumption, namely, that the contractor is entitled to an annual fixed-price payment based upon some percentage of the evaluated bid price. In its initial claim, Marut sought to be reimbursed for 125 % of the total evaluated contract price for the base year and the four option years. Finding 16. Following the Board's decision in GSBCA 15412, Marut revised its claim and submitted instead three claims, each for one of the three years the contract was in existence. In each claim, Marut contended that it had performed the services and provided the materials called for in the contract for a firm fixed-price contract amount. Marut calculated this firm fixed-price contract amount to be \$77,665.25, i.e., ten percent of what it deemed to be the total evaluated bid price, as that term is used in the Minimum/Maximum Contract and Order Limitation clause. See Findings 20-22. In a subsequent submission after the exchange of pleadings, Marut's president expanded the company's claims. For a four-year period,³ appellant sought an annual fee on a fixed-price

² In its Statement of Genuine Issues, Marut correctly observes that it never submitted a "bid," as such, in response to GSA's RFP because this was a negotiated rather than a formally advertised procurement. Appellant's Statement of Genuine Issues at 1, 3. Nevertheless, since the term appears in the Minimum/Maximum Contract and Order Limitation clause and is readily used by both parties throughout this case, we will use it ourselves for purposes of this discussion -- recognizing, however, that use of the terms "offered" or "negotiated" in the clause would have been preferable to the use of "bid" in its broader sense.

³ We do not understand why Marut in this expanded version of its claims included claims covering a fourth one-year period. The three claims submitted to the contracting officer and addressed in his decision were limited to the three years the contract was in existence. As already noted, Marut's president himself readily admits that GSA did not exercise its option to extend the contract into a fourth one-year period. Finding 15. We conclude, therefore, that the inclusion of an additional year in this expanded version of the original three claims rejected by the contracting officer was simply inadvertent. Although the Government in its motion to dismiss makes no mention of these new claims, we have no hesitancy to dismiss them as entirely beyond the scope of the claims which are the subject of this appeal -- if, in fact, their inclusion was actually intended.

basis for each of the three basic types of CIS services available under the contract. For Standard Services, Marut sought an annual fixed-price fee of \$155,330.50 (twenty percent of the total evaluated bid price for all five years of anticipated contract performance); for Special Services, it sought an annual fixed-price fee of \$77,665.25 (ten percent of the total evaluated bid price); and for Shop Drawing and Submittal Review and Drafting Services, it sought a fixed-price fee of \$77,665.25. Finding 29.

Marut's utilization of some percentage of the evaluated bid price as a basis for a fixed-price payment under the contract is undoubtedly prompted by reference to the evaluated bid price in the contract's Minimum/Maximum Contract and Order Limitation clause. This, however, hardly justifies the fixed-price payments Marut is seeking. It is, of course, true that the RFP advised offerors that the Government was soliciting CIS services under a firm fixed-price contract. Nevertheless, from the nature of the contractual scheme contemplated in the RFP, it is apparent that the contract was to be a fixed-price contract only to the extent that the offeror proposed fixed hourly rates for six inspector disciplines and the Government agreed to use these rates in pricing work orders involving in-house capabilities. See Findings 2-3, 5-8. These hourly rates were multiplied by estimated regular and overtime hours for each inspector discipline in order to arrive at an overall contract price solely for purposes of evaluation. Finding 4.

Although the contract is referred to as a firm fixed-price contract, we find nothing in its provisions to support appellant's apparent assumption that some percentage of the overall evaluated bid price represents a fixed price for services or materials under the contract. Yet this appears to have been the understanding of Marut's president in filing claims.⁴ See Findings 16-17, 20-22, 28-29. The RFP and later the contract itself provided that, on an as-needed basis, the contracting officer would issue a work order for a particular project. The agreed-upon fixed rates would then serve as the basis for pricing these orders and the CIS would be paid per month for the actual hours worked by the staff in accordance with the orders. See Finding 6. We can find no reasonable basis in the contract, as written, for concluding, as Marut does, that the contractor is entitled to any sort of a fixed-price payment outside of this ordering scheme described in the contract. We interpret the contract, when read as a whole, as providing for payment only pursuant to work orders based upon fixed hourly rates (in the case of services within the CIS's in-house capabilities) or negotiated rates (for services determined by the CIS to be beyond its in-house capabilities). Findings 2-3,

⁴ We recognize that Marut's president has stated that, following the Board's decision in GSBCA 15412, he amended the company's claim in the instant case "to assert recovery based on the 10% guaranteed minimum not on the basis of the firm fixed-price contract as in GSBCA No. 15412" Marut Declaration ¶ 69. He also has specifically declared that "the contract was not a firm fixed-price contract but an indefinite quantity indefinite delivery contract" *Id.* ¶ 75. Notwithstanding such statements, it is clear from the company's amended claims -- particularly those submitted after the exchange of pleadings -- that Marut still believes that the contract evaluated bid price somehow equates in whole or in part to a fixed price which must be paid in the event the Government fails to comply with ordering requirements under the contract.

6-8. We find nothing in the contract suggesting that the total evaluated bid price or any percentage of it is intended to serve as a fixed price payable under the contract.

Although the total evaluated bid price does not serve in this contract as the basis for any fixed-price payments, it is, as already mentioned, used as a basis for determining the minimum and maximum order limitations under the contract. The contract's Minimum/Maximum Contract Order Limitation clause states that orders shall not exceed 125 % of the total evaluated bid price and that minimum orders shall be at least ten percent of the evaluated bid price. Finding 6. This brings us to Marut's second incorrect assumption.

Appellant remains convinced that the term "evaluated bid price," when referred to in establishing the minimum order limitation under the Minimum/Maximum Contract and Order Limitation clause, means the sum of the total of the evaluated offer prices for the base contract year plus all four option years (\$776,652.50). This is an interpretation issue which we examined in some detail in GSBCA 15412. In that case, we were confronted with a similar contract containing the same minimum order limitation provision. We noted at the time that, although the term "evaluated bid price" was not defined in the Minimum/Maximum Contract and Order Limitation clause, the contract's bid schedules referred to each individual year's total price as the "total evaluated offer price" for that year. We, therefore, concluded that this was the meaning to be given to the term as it appeared in the clause. Marut Testing, 02-2 BCA at 157,821. Given the similarity of the contract in this case to the contract in our earlier Marut Testing decision and, in particular, the identical wording of the applicable contract provision and the bid schedules, we see no reason why we should not interpret the phrase, as used in the clause, in the same manner. See Findings 3, 18-19.

Taking this issue one step further -- as already noted -- at the base of the final bid schedule submitted by offerors (that listing the hourly rates for the fourth option year), after the entry for the "Total Evaluated Offer Price" is an additional space for entry of the "Grand Total Evaluated Offer Price for the Base Year, Option 1, 2, 3, and 4." Finding 3. If the intent of the Minimum/Maximum Contract and Order Limitation clause was to use this grand total figure -- as Marut contends -- as the basis for determining minimum and maximum order limitations, then we would expect the clause to refer to the grand total figure rather than to the simpler term of "evaluated bid price." It does not.

As we noted in GSBCA 15412, however, our principal difficulty with Marut's reading of "evaluated bid price" to mean the grand total of the evaluated prices for the base year and the four options is that it inevitably leads to an immediate inconsistency in contract terms if the contract continues beyond the base year. The clause provides that the minimum order limitation is ten percent of the evaluated bid price. If, as Marut contends, this means ten percent of the grand total of \$776,652.50, then the minimum requirement for the base year would be ten percent of this figure or \$77,665.25. If the contract is extended for another year, however, the minimum requirement, according to appellant, increases by another \$77,665.25. This, however, contrary to the Minimum/Maximum Contract and Order Limitation clause, makes the minimum requirement twenty rather than ten percent of the grand total evaluated bid price. If extended into a third year, the minimum would be thirty percent rather than ten. As we noted in GSBCA 15412, we will not read the contract in a

way that creates such an inconsistency between its terms. Marut Testing, 02-2 BCA at 157,822. We therefore, for a second time, reject Marut's interpretation of the term "evaluated bid price" as in basic conflict with the wording and obvious intent of the contract's Minimum/Maximum Contract and Order Limitation clause.

Marut's Base Year Claim

As originally presented, Marut's claim regarding the base year of contract performance was for \$37,868.93 after applying a credit of \$39,796.32 for work orders actually issued and paid for. Finding 20. As later expanded to cover the three basic types of CIS service covered by the contract, the base year claim afforded no credit for the orders actually issued. Finding 29. Nevertheless, there appears to be no dispute between the parties over whether work orders were issued during the base period or whether Marut was paid \$39,796.32. See Finding 11. Marut's complaint is simply that these orders did not meet the minimum ordering requirement as it interpreted the applicable portion of the contract.

We have, however, rejected Marut's interpretation of the contract and reaffirmed our previous interpretation of the contract's Minimum/Maximum Contract and Order Limitation clause. The contracting officer correctly applied this interpretation when he advised the claimant that the minimum order requirement under the contract was for ten percent of the evaluated total for the year the contract was in effect. Finding 23.

Based upon Marut's evaluated bid price of \$155,330.50 for the base year, the contracting officer correctly calculated that the minimum orders for that year should have been \$15,533.05. Finding 23. Since the number of orders issued during the base year was in excess of that amount, the contracting officer properly denied Marut's claim for that period of the contract. Given the correctness of the contracting officer's interpretation of the contract and the absence of any dispute regarding material facts, we grant the Government's motion for summary relief on Marut's claims for the base period.

Marut's Claim for Option Year One

The contracting officer's position regarding Marut's claim for the first option year of the contract is decidedly different from the position he takes with regard to the base year. The contracting officer readily admitted that, during the first option year, the Government failed to place any orders. On this fact, the parties are in agreement. Finding 12. Based upon the Government's failure to place any orders, the contracting officer concluded that Marut is entitled to recover an anticipated profit of eleven percent on the guaranteed order amount of \$15,533.05 for that year. This determination was said to be based upon our ruling in GSBCA 15412 that appellant was entitled to recover its anticipated profit as a result of GSA's failure to meet the minimum ordering requirements in a similar contract it had with appellant. Finding 24.

The Government's motion for summary relief on Marut's claim for the first option year is based upon the assumption that the Board in GSBCA 15412 held that, when the Government fails to meet its minimum ordering obligations under the contract's

Minimum/Maximum Contract and Order Limitation clause, the contractor is entitled to recover only the profit it anticipated realizing on orders amounting to ten percent of the evaluated bid price for the year in question. Respondent's Motion for Summary Relief at 15.

The Board's decision in GSBCA 15412 to award Marut only anticipated profits on the minimum amount of orders the Government was obliged to issue under the contract was based upon a decision which had recently been issued by the Court of Appeals for the Federal Circuit, White v. Delta Construction International, Inc., 285 F.3d 1040 (Fed. Cir. 2002). In that case, the Court held that when the Government breaches a contractual provision obligating it to order a minimum amount of work, the proper basis for damages is the loss the contractor suffered, not the full amount it would have received if the Government had placed the minimum amount of orders. The sound rationale behind the decision is that, if the contractor were to receive an award in excess of the loss sustained, this would obviously place the contractor in a better position than it would have occupied if it had received the minimum guaranteed amount of orders and incurred the costs associated with performing the work required by the orders. Id. at 1043.

In GSBCA 15412, we awarded Marut its anticipated profit and nothing more because it was our conclusion that Marut had not established that it incurred any damages other than lost profits due to GSA's failure to order the minimum amount guaranteed by the contract. Marut Testing, 02-2 BCA at 157,823. This is not to say, however, that, in the event of the Government's breach of the minimum ordering requirement, Marut could not recover more than its anticipated profit if it were able to prove that its incurred damages went beyond the loss of anticipated profit.

As noted in our discussion of the Government's motion to dismiss, we are convinced that it is sufficiently clear from the face of appellant's original three claims that Marut is concerned with recovering various costs said to be associated with contract performance and that it believes it is afforded the means of defraying these costs in whole or in part through the Minimum/Maximum Contract and Order Limitation clause. Respondent complains that no sum certain regarding the alleged costs has ever been provided by Marut. Before making any award of damages under this clause, which might help to defray the contractor's alleged costs, we would of course insist that Marut prove that costs were actually incurred, were reasonable under the circumstances, and were related to the contract. We do not, however, consider the lack of specific information as to these alleged costs at this time to be a fatal defect in Marut's claims. As pointed out earlier, we do not understand the claims which are the subject of this appeal to be claims for costs. Rather, it is our understanding that Marut seeks a sum certain based upon its interpretation of the Minimum/Maximum Contract and Order Limitation clause and, if awarded that sum, plans to use it to defray at least some costs said to have been incurred under the contract. For the reasons already stated above, however, we have rejected Marut's interpretation of the clause and, therefore, the specific quantum it seeks.

This, however, is not to say that Marut should, as a result of our ruling here, be barred from proving its entitlement to actual damages within the limits set in the Minimum/Maximum Contract and Order Limitation clause as we interpret it.

We, therefore, deny the Government's motion for summary relief with regard to Marut's claims for the first option year. We are prepared to hear Marut's evidence as to additional damages suffered as a result of the Government's failure to place any work orders during option year one. Nevertheless, given certain observations already made thus far by the parties in briefing the Government motions, we recognize at the outset that there are significant issues that remain to be explored regarding any alleged additional damages.

Among these issues are whether costs incurred to meet the requirements of the contract's Inspection of Services-Fixed-Price clause or to provide a specific CIS service in the absence of any work order can ever be considered a compensable damage under the contract, and whether Marut's continued payment of standby costs over a prolonged period of time in the absence of any work order can be deemed reasonable. This last issue appears to be especially pertinent to those CIS services where, under the contract, it is clearly within the discretion of the contractor to determine whether a requested service is beyond the CIS's in-house capabilities. Another issue which undoubtedly must be addressed by the parties is the contracting officer's avowed intention to withhold any amounts found due to appellant up to the amount of overpayment which the Board in GSBCA 15412 found to have been made to Marut. See Findings 6-9, 25-27.

Marut's Claim for Option Year Two

We deny GSA's motion for summary relief on Marut's claim for option year two because the parties are in obvious disagreement on a material issue, namely, whether any work orders were issued during this period. Finding 14. The contracting officer's decision is based upon the assumption that no orders were issued. Marut contends, instead, that orders were issued but cancelled five months later after a considerable amount of work had already been performed. Marut Declaration ¶¶ 57-59. In support of its contention, Marut has provided for the record copies of three work orders dated 1/25/96, which total \$10,582.30, and copies of subsequent cancellations of those orders. Appeal File, Exhibits 30, 32. This convinces us that there is a bonafide dispute regarding this issue and that we should, for purposes of ruling on the Government's motion for summary relief, draw an inference in favor of the non-moving party, in this case Marut.

Since the amount of work allegedly called for during this period does not meet the contract's minimum order requirement under the Minimum/Maximum Contract and Order Limitation clause, the cost of performing this work may arguably qualify as compensatory damages under that clause. Consequently, Marut should be given an opportunity to prove its allegation and any alleged damages incurred during this third year of the contract.

Decision

The Government's motion to dismiss this case is **DENIED**. The Government's motion for summary relief on Marut's claims regarding the contract's base year is **GRANTED**. All other portions of the motion for summary relief are **DENIED**.

EDWIN B. NEILL
Board Judge

We concur:

STEPHEN M. DANIELS
Board Judge

ANTHONY S. BORWICK
Board Judge