

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of -)
)
Vigor Marine, LLC) ASBCA No. 63405
)
Under Contract No. N00024-19-C-4447)

APPEARANCES FOR THE APPELLANT: Mark G. Jackson, Esq.
Stowell B. Holcomb, Esq.
Matthew Emmons, Esq.
John Barr, Esq.
Charles Olmsted, Esq.
Jackson Holcomb LLP
Seattle, WA

APPEARANCES FOR THE GOVERNMENT: Tracey R. Rockenbach, Esq.
Navy Chief Trial Attorney
Jacquelyn C. Fiorello, Esq.
Devin A. Wolak, Esq.
Trial Attorneys

OPINION BY ADMINISTRATIVE JUDGE EYESTER ON
CROSS MOTIONS FOR SUMMARY JUDGMENT

The Department of the Navy (Navy) issued a unilateral modification requiring Vigor Marine, LLC (Vigor) provide an additional 161 days of pierside availability¹ for the USS Chosin at a unit price of \$5,000 per day. Vigor filed a claim arguing the modification changed the contract and seeking a total of \$11,024,797 for the 161 days of pierside extension. The contracting officer denied the claim and Vigor has appealed.

Both parties filed motions for summary judgment, and the Board held an oral argument on the matter. The parties then filed supplemental responses. Based on our review of the record and briefs, there are no genuine disputes of material facts; rather, the matter here presents a question of contract interpretation. We conclude the plain language of the contract supports Vigor's interpretation and we therefore grant Vigor's motion for summary judgment.

¹ Availability refers to the scheduled assignment of a ship to an industrial activity for repairs, maintenance, or modernization (compl. at 2 n.1).

STATEMENT OF FACTS

The Solicitation

1. On March 1, 2019, the Navy issued Solicitation No. N0002419R4447 seeking proposals for the repair and modernization of the USS Chosin and USS Cape St. George during what is referred to as the modernization period (MODPRD) (R4, tab 1 at 1-2, 79).² Relevant here is contract line item number (CLIN) 0054, a fixed-price option for daily extensions, or more specifically for additional pierside days requiring availability for the USS Chosin. This extension option stated the following:

ITEM NO CLIN Number 0054	SUPPLIES/SERVICES	QUANTITY 85	UNIT Days	UNIT PRICE	AMOUNT
OPTION	Daily Extensions FFP Additional Days Pierside requiring Availability Extension. See attachment J-4. See Notes B, C, D, E, and G. NOTE: The requirements in DFARS 252.211-7003, Item Identification and Valuation, are applicable for this line item. The contractor shall provide DoD unique identification or a DoD recognized unique identification equivalent. FOB: Destination PSC CD: J999				

NET AMT

(*Id.* at 42)

2. CLIN 0054 referenced several notes, including Note C (R4, tab 1 at 42). In turn, Note C referenced Federal Acquisition Regulation (FAR) 52.217-7, OPTION FOR INCREASED QUANTITY-SEPARATELY PRICED LINE ITEM (MAR 1989) (*id.* at 75, 129). The solicitation also set forth FAR 52.217-7 in full text (*id.* at 129-30). In addition, CLIN 0054 referenced Note E, which was referred to as a schedule of prices/rates for government-required extensions (*id.* at 42, 75-76).

3. Amendment 02 to the solicitation added a paragraph to FAR 52.217-7, OPTION FOR INCREASED QUANTITY-SEPARATELY PRICED LINE ITEM (MAR 1989), which explained that for CLINs 0052-54, the Navy may require such items as an option “in the quantity and at the price stated in the Schedule.” The amended solicitation paragraph further stated the contracting officer may exercise the option in writing “no later than final delivery of vessel” and the added items “shall

² Rule 4 references are to Bates-stamped page numbers.

continue at the same rate that like items are called for under the contract, unless the parties otherwise agree.” (R4, tab 1b at 188)

4. Amendment 03 to the solicitation changed Note E, identifying the changes, as follows:

The contract’s fixed fully burdened daily rates for pierside and dry-docking are shown below. These rates are to be used during the ~~entire~~ availability’s extension period, **up to 24 months after the Attachment J-3 and Attachment J-13 availability completion date.**~~regardless of how many day extensions are procured and negotiated beyond the contracted availabilities delivery date.~~ These fixed rates shall be used for additional docking and pierside days:

USS CHOSIN FY20 MODPRD	Additional Day requiring Availability Extension	Additional Day does not require Availability Extension
Additional Dry-Docking Day	TBD	TBD
Additional Pierside Day	TBD	

(R4, tab 1c at 204) (edits in the original). The referenced attachments J-3 (for the USS Chosin) and J-13 (for the USS Cape St. George) relate to the milestones and key event dates (R4, tab 1 at 139). As J-3 relates to the USS Chosin, it is relevant here.

5. The solicitation explained how the agency would evaluate offers; important here is how the Navy stated it would evaluate price, especially the price for options. In this regard, the Navy would evaluate price based on information set forth in the offeror’s pricing workbook, which was attachment J-4 for the USS Chosin (R4, tab 1a at 165, 177). Specifically, the Navy stated it would calculate the total evaluated price by adding: the price of the basic CLINs; the price of all option CLINs and growth reservation CLINs³ (base and option); the evaluated price of the extension day rates and fully burdened ship repair labor rates and material burden rates for new work; the value adjusted total evaluated price schedule acceleration adjustments, if applicable;

³ Growth reservation refers to the potential for growth and new work which might be identified during the overhaul (*see* R4, tab 2 at 397, Navy Marine Corps Acquisition Regulation Supplement 5252.217.9107(a), GROWTH AND NEW WORK (SEP 1990)).

and the value of the inter-port differentials, if applicable. The Navy was to calculate the extension day price as follows:

- (1) Multiply the proposed daily rate by the number of days associated with that rate (for each extension type) to yield the evaluated price for that daily extension type.

The Navy advised offerors that “the number of Extension days as well as the number of labor hours and the material dollar value used to calculate the Extension Day Price and the New Work Rates are for evaluation purposes only.” (*Id.* at 177) The Navy evaluated only the 85 days for option CLIN 0054 (R4, tab 13 at 990; tr. 48). The solicitation incorporated by reference FAR 52.217-4, EVALUATION OF OPTIONS EXERCISED AT THE TIME OF CONTRACT AWARD (JUNE 1988), and FAR 52.217-5, EVALUATION OF OPTIONS (JUL 1990) (R4, tab 1 at 163).

6. According to deposition testimony, the Navy did not randomly select the quantity of 85 days for CLIN 0054; instead, “[t]he Navy took the median of ‘Experienced pier-side extension’ values across the eight CG-47⁴ class docking availabilities in its data set to obtain 85 days” (app. supp. R4, tab 112 at 1791). More specifically, the testimony explains that “to ensure that offerors would propose a competitive daily rate for pierside extensions,” the Navy ensured the proposed daily rate had an “appropriate weight within the offeror’s total evaluated price” and therefore “multiplied the offeror’s proposed daily pier-side extension rate by a notional number of extension days representing a reasonable forecast of the possible future extensions to be experienced during availability execution” (*id.* at 1790-91).

The Contract

7. The Navy awarded Vigor fixed-price Contract No. N00024-19-C-4447 on September 25, 2019, in the amount of \$254,566,431.36 for repair and modification of the USS Chosin and the USS Cape St. George (the MODPRD contract) (R4, tab 2

⁴ The CG-47 class refers to the Ticonderoga ship class (*see* R4, tab 2 at 376). The USS Chosin is a Ticonderoga-class guided missile cruiser (gov’t statement of undisputed material facts (SOUMF) ¶ 1).

at 267, 356). The Navy exercised option CLIN 0054 at contract award; the exercised option CLIN 0054 appears as follows in the contract:

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ITEM NO	SUPPLIES/SERVICES	QUANTITY	UNIT	UNIT PRICE	AMOUNT
CLIN Number 0054		85	Days	\$5,000.00	\$425,000.00
EXERCISED OPTION	Daily Extensions FFP Additional Days Pierside requiring Availability Extension. See attachment J-4. See Notes B, C, D, E, and G. NOTE: The requirements in DFARS 252.211-7003, Item Identification and Valuation, are applicable for this line item. The contractor shall provide DoD unique identification or a DoD recognized unique identification equivalent. FOB: Destination PURCHASE REQUEST NUMBER: 1300815942 PSC CD: J999				
NET AMT					\$425,000.00
ACRN AF CIN: 130081594200013					\$425,000.00

To state the obvious, the CLIN set forth a quantity of 85, a unit of days, and unit price of \$5,000. (R4, tab 2 at 315) The total fixed-price amount for option CLIN 0054 was \$425,000 (85 days*\$5,000) (*see id.*).

8. CLIN 0054 was for “Daily Extensions,” which are “Additional Days Pierside requiring Availability Extension. See attachment J-4” (R4, tab 2 at 315). The referenced attachment J-4, as noted above, was the pricing workbook provided to offerors as part of the solicitation (*see* R4, tab 1a at 165, 177; tab 3; gov’t resp. to app. supp. SOUMF at 5). The relevant portion of attachment J-4, which was completed by Vigor and incorporated into the contract, read as follows:

	Additional Days Pier Side requiring Availability Extension	Price / Day \$	Price (\$ * Days)
CLIN 0054			
Daily Extensions	85	\$5,000.00	\$425,000

(R4, tab 3 at 460) (highlighting in original).

9. CLIN 0054 also referenced Notes B, C, D, E and G (R4, tab 2 at 315). As relevant here, Note C in the contract stated that CLIN 0054 was an option item to which FAR 52.217-7 applies. Further, the item “is to be supplied only if and to the extent . . . exercised.” (*Id.* at 352) FAR 52.217-7, (MAR 1989), OPTION FOR

INCREASED QUANTITY-SEPARATELY PRICED LINE ITEM, referenced in Note C and incorporated in the contract, stated:

Applicable to Daily Extension Rates CLINs 0052 – 0054

The Government may require the delivery of the numbered line item, identified in the Schedule as an option item, in the quantity and at the price stated in the Schedule. The Contracting Officer may exercise the option by written notice to the Contractor no later than final delivery of vessel. Delivery of added items shall continue at the same rate that like items are called for under the contract, unless the parties otherwise agree.

(*Id.* at 408-09) Also relevant here is Note E, which stated as follows:

NOTE E: SCHEDULE OF PRICES / RATES FOR THE PURPOSES OF A GOVERNMENT REQUIRED EXTENSION; DAILY RATES FOR PIERSIDE AND DRY-DOCKING (FULLY BURDENED)

• CLINS 0052-0054 for USS CHOSIN (CG 65) FY20 MODPRD . . .

1. In the event of a Government required extension, the Contractor's fully burdened daily rates for pierside and dry-docking will be used for negotiating additional dry-dock and/or pierside performance days under this contract.
2. The contractor agrees that the daily rates shall include all costs that run with time associated with additional performance days in accordance with the work package specification requirements of this availability. The daily rates shall include all costs associated with additional performance days (whether charged directly or indirectly by the offeror's accounting systems) including but not limited to:
 - Temporary Services
 - Internet Connectivity
 - Air Conditioning
 - Support Services for the Navy, its agents and contractors

- Facilities . . .
 - Project Management and other labor costs that run with time. . .
 - Transportation
3. The fully burdened daily rates are fixed daily rates that include all wages, overhead, all other indirect costs, general and administrative expenses, Facilities Capital Cost of Money (FCCOM) and profit.
 4. The contract's fixed fully burdened daily rates for pierside and dry-docking are shown below. *These rates are to be used during the availability's extension period, up to 24 months after the Attachment J-3 and Attachment J-13 availability completion date.* These fixed rates shall be used for additional docking and pierside days:

USS CHOSIN FY20 MODPRD	Additional Day requiring Availability Extension	Additional Day does not require Availability Extension
Additional Dry-Docking Day	\$7,500	\$10,000
Additional Pierside Day	\$5,000	

(*Id.* at 352-53) (emphasis added in italics) Attachment J-3, relating to the USS Chosin, stated the contractor's completion date was January 11, 2021, and the end of availability was March 1, 2021 (R4, tab 2a at 420). Almost every contract CLIN also referenced Note E (*see* R4, tab 2 at 269-72, 275-319, 321-49).

10. Several of the option CLINs relating to growth reservation referenced Note A (*see* R4, tab 2 at 296), which is not applicable to CLIN 0054 relating to daily extensions, but is nonetheless relevant to arguments in this appeal. Note A stated that it was a level of effort to complete for ship repair and therefore Vigor agreed to provide a certain number of hours and certain dollar value of materials when performing the growth CLINs (e.g., repair and modernization) (*id.* at 349). Note D, which was referenced in CLIN 0054, discusses the level of effort to completion, and specifically references Note A and "hours or materials" agreed to or to be adjusted (*id.* at 352). Likewise, Note G, referenced in CLIN 0054, also references the level of effort to completion in Note A (*id.* at 354).

11. In addition to the above, the contract included FAR 52.233-1, Alt I, DISPUTES (MAY 2014) – ALTERNATIVE I (DEC 1991) and FAR 52.243-1, CHANGES-FIXED PRICE (AUG 1987) (R4, tab 2 at 404-05).

The Modifications

12. On February 25, 2020, Vigor notified the Navy that the USS Chosin was tendered to Vigor's shipyard 30 days late and that a different contractor, who was performing on the Special Selected Restricted Availability (SSRA) contract, had not completed its work on the USS Chosin and thus also delivered the ship unready for Vigor to begin work (app. supp. R4, tab 15 at 996). Vigor informed the Navy that the schedule to complete the remaining items would need to be extended by 225 days (app. supp. R4, tab 16 at 998).

13. On May 19, 2020, the Navy contract specialist emailed Vigor a request for proposal for the 225-day extension and for listed changes, noting the period of performance would now be July 14, 2021 through October 28, 2021, and stating: "Please note that the Government intends to invoke CLIN 054 to execute the first 85 days (4/19/21-7/13/21) of the extension for pier side support, as stated in Section B, Note E of the Basic Contract" (app. supp. R4, tab 22 at 1029). The Navy sent Vigor, as part of a meeting request, a memorandum titled "USS CHOSIN (CG 65) Modernization Period (MODPRD);" "Application of Daily Extension CLINs to 225 days of docking extension;" "Pre-decisional" (app. supp. R4, tab 23 at 1031, 1033). According to the memorandum, CLIN 0054 for daily extension rates (and the two other similar extension CLINs) included all costs (see Note E, paragraph 2) such as support services; the option CLINs were exercised at the time of contract award; and CLIN 0054 was for pierside support services after the ship was undocked at a "[p]roposed daily rate \$5,000/day, up to 85 days" (*id.* at 1034-35) (emphasis added).

14. Further, the memorandum stated that CLIN 0054, for pierside support of the 225-day extension, would start when the ship was undocked, and thus "CLIN 54 [would] support the first 85 days after Ship undocks," (app. supp. R4, tab 23 at 1038). The memorandum stated that the requests for contract changes (RCCs) associated with the new SSRA work would fund the remaining days (for docking and pierside support) until the extended availability end date of October 29, 2021. (App. supp. R4, tab 23 at 1037-38; app. supp. R4, tab 29 at 1062).

15. The Navy informed Vigor it would treat the two other extension CLINs in the same manner -- the "[f]unding for docking extension will include [the] exhausting of CLIN 52 and 53, followed by" an RCC (app. supp. R4, tab 23 at 1037). Thus, like CLIN 0054 where the Navy anticipated the RCCs would fund the remaining 107 days after the 85 days were exhausted, the Navy anticipated an RCC would fund the remaining 192 days after the CLIN 0052 and 0053 days were exhausted (*id.* at 1037-38).

16. On June 22, 2020, the administrative contracting officer (ACO) at the time wrote an internal email concerning discussions about Section B, Note E of the base

contract. The ACO summarized a meeting with the program management team stating Vigor's position, and that "[t]he extension rates were not intended to be used for such a long period (225 days)." According to the ACO, if you extrapolated the rates to the entire 225 days, it would not be a "fair and reasonable outcome" considering the position of both parties. (App. supp. R4, tab 26 at 1046)

17. On June 26, 2020, the ACO emailed Vigor seeking clarification of its pricing (R4, tab 5). Vigor emailed the contracting officer with the following:

Vigor requests that CLIN 0052, 0053 and 0054 be applied to the period of performance as follows; final 85 days, as defined on CLIN 0054, final 5 days, as defined on CLIN 0053 and the final 30 days, as defined on CLIN 0052. This request is in consideration of utilizing the CLINs as defined in the base Contract.

(*Id.* at 467)

18. Meanwhile, the Navy's July 16, 2020 business clearance memorandum stated that the magnitude of the extra work was not known at the time of solicitation for Vigor's contract. The new work required support for docking and pierside support. (App. supp. R4, tab 29 at 1061) The memo explained that the Navy's request for a proposal to Vigor for the extra SSRA work "instructed Vigor to apply CLIN 054 to all RCCs for pier side support for the first 85 days of the availability extension and provide proposals for the remaining 140 days of availability extension" (*id.* at 1062). The memorandum noted that Vigor included CLIN 0054 support for the first 85 days of the 225-day extension "as instructed" in the Navy's request for proposal (*id.* at 1064).

19. In Vigor's extension proposal, Vigor listed its assumptions/exceptions. As relevant here, Vigor wrote that based on negotiations for the 225-day extension, it changed its prior proposal to state it did not agree that CLIN 0054 was applicable, the RCCs issued to support SSRA unfinished work fell outside the general classification of new or growth work under the MODPRD contract, but Vigor nonetheless utilized CLIN 0054 to resolve the SSRA unfinished work matter. (R4, tab 6 at 471) Further, Vigor stated:

[Vigor requests that CLIN 0052, 0053 and 0054 be applied to the period of performance as follows; *final* 85 days, as defined on CLIN 0054, final 5 days, as defined on CLIN 0053 and the final 30 days, as defined on

CLIN 0052. This request is in consideration of utilizing the CLINs as defined in the base Contract.

(*Id.* at 471-72) (emphasis added) Vigor repeated the same later in the proposal, explaining that it requests the CLIN 0054 final 85 days be applied to this extension, and that it will utilize CLIN 0054 “for any credit due to the government for early finish” and “any additional extensions beyond the 225 days will be priced at the agreed upon labor rate and cost structure” (*id.* at 478). Vigor again explained that CLIN 0054 covers 85 days of the 225-day extension and the “remaining 140 days are priced as outlined” (*id.* at 479).

20. On July 24, 2020, the Navy issued a modification memorializing the parties’ July 20, 2020 agreement regarding the Navy’s request for an out-of-scope 225-day extension to the period of performance for the USS Chosin availability (R4, tab 7 at 813-14). The modification “[i]ncorporate[d] by [] reference the Extension RCCs, the Extension Proposal, and Attachment 1: J-3 CG65 CHO Flex Milestones Rev. 3” (*id.* at 814). The modification changed the CLIN 0054 delivery date (end of availability) from March 20, 2021 to October 31, 2021, but the stated quantity remained as 85 days (*id.* at 844-45). As referenced above, initially, the contract’s attachment J-3 stated the end of availability was March 1, 2021 (R4, tab 2a at 420), which was later changed per a revision to attachment J-3 to an end of availability date of March 20, 2021 (app. supp. R4, tab 23 at 1036). Now the end of availability was October 31, 2021 (*see* R4, tab 7 at 845).

21. In March 2021, the Navy realized that due to the difficulty in restoring legacy systems and the fact it underestimated the complexity of the unfinished SSRA work, it should extend Vigor’s contract (app. supp. R4, tab 37 at 1223). Ultimately, the Navy decided a 161-day extension was necessary (app. supp. R4, tab 76 at 1454). Vigor submitted a proposal on August 4, 2021, for this extension, assuming “the previously agreed upon 225-day availability completion date extension cost structure set forth” in the modification would be utilized. Vigor also assumed that the 225-day extension under CLIN 0054 meant the 85 days included in the CLIN had been fully expended and was not applicable to the level of effort in this proposal. (R4, tab 8 at 849, 851-52; *see also* tabs 8a, 8b, 8d, and 8e)

22. On September 30, 2021, the Navy issued a unilateral modification extending the pierside availability by 161 days (R4, tab 10 at 967). In the modification, the Navy stated it was “exercising Note E Paragraph four” at a rate of \$5,000/day for a pierside availability extension for a total of \$805,000 (161 days*\$5,000) (*id.* at 968). The Navy then added CLIN 0167 as “a continuation of CLIN 0054 See Notes B, C, D, E, and G” (*id.* at 968-970). Further, the modification stated Vigor could seek additional compensation pursuant to the FAR disputes clause (*id.* at 968).

The Claim

23. Vigor submitted a claim on March 22, 2022, concerning the unilateral 161-day extension modification (R4, tab 12; tab 13 at 988). Vigor argued the Navy could not exercise the option at Note E and extend the pierside availability at a unit price of \$5,000/day for 161 days; rather, the rate was \$68,477/day for the 161 days (R4, tab 12 at 980). Vigor argued the single option for pierside availability was 85 days at \$5,000/day and thereafter the Navy had to rely on the changes clause for the modification (*id.* at 982). As Vigor explains, Note E's statement that the rates are to be used during an extension, "up to 24 months after" the completion, "merely identifies the window within which the Navy may use the CLIN 0054 days, not the number of days it may order at \$5,000 per day" (*id.* at 984).

24. The contracting officer issued a final decision (COFD) on July 19, 2022 (R4, tab 13). According to the COFD, the 85 days were for evaluation purposes only and Note E provided that the Section B schedule is not limited to the 85 days (*id.* at 990). Further, the reference to "up to 24 months after the" completion date in Note E meant the Navy could apply the rates on September 30, 2021 (the date of the unilateral modification) which was within the 24 month period after March 1, 2021. According to the Navy, the 24 months was not a window; rather, it was a time period in which the Navy could use the \$5,000/day rate (i.e., up to 24 months after the initial availability extension or March 1, 2023). (*Id.* at 991)

DECISION

At issue is the Navy's unilateral modification for a 161-day extension at a unit price of \$5,000/day based on its interpretation of CLIN 0054. In its complaint, like the claim, Vigor argues the \$5,000/day unit price was for 85 days only, and therefore the Navy constructively changed the contract by ordering more than 85 days at that unit price (compl. ¶¶ 57-94). Vigor contends it is entitled to recover its actual costs or, in the alternative, the Navy was required to negotiate the price for the additional 161 days of pierside services (*id.* ¶¶ 95-100). The Navy filed a motion for summary judgment and Vigor filed a cross motion.

Summary judgment is appropriate when the record shows there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). The standard with cross-motions, as with a motion for summary judgment, is that each nonmovant must receive the benefit of favorable inferences. *Chevron U.S.A. Inc. v. Mobil Producing Tex. & N.M.*, 281 F.3d 1249, 1253 (Fed. Cir. 2002) (citing *Murphy Expl. & Prod. Co. v. Oryx Energy Co.*, 101 F.3d 670, 673 (Fed. Cir. 1996)). In addition, the issue here is contract interpretation, which is a question of law, not fact, making it an issue that is "generally amenable" to summary judgment. *Varilease Tech. Grp., Inc. v. United States*, 289

F.3d 795, 798 (Fed. Cir. 2002) (citing *Textron Def. Sys. v. Widnall*, 143 F.3d 1465, 1468 (Fed. Cir. 1998)); *see also Walsh Grp. Ventures*, ASBCA No. 61222, 20-1 BCA ¶ 37,615 at 182,584.

Vigor's interpretation of the contract is straightforward. It asserts the plain language of CLIN 0054 shows it was for 85 days at a unit price of \$5,000 a day for a total of \$425,000 (app. mot. at 36-38). Vigor contends that the referenced attachment J-4 (the pricing workbook) restates CLIN 0054 and the referenced Note E does not add 24 months to the option but rather imposes a time limit upon when the Navy may exercise the option (i.e., up to 24 months after the attachment J-3 availability completion date)⁵ (*id.* at 38-39).

The Navy's interpretation is more complicated. According to the Navy, the plain language of CLIN 0054 establishes a two-stage process. The first stage is the fixed-price extension up to and including 85 days (gov't mot. at 11). The second stage is when, once the 85 days are consumed, Note E takes effect and the same unit price is used for any extension up to 24 months after the initial availability completion date (which at award was March 1, 2021, and thus 24 months later was February 28, 2023)⁶ (*id.* at 12-14). In other words, according to the Navy the \$5,000/day unit price applies for 85 days and then another 730 days through February 28, 2023 (gov't supp. br. at 2). Following the 85 days and then 730 days (24 months), the parties could negotiate new rates (gov't mot. at 14-15). As the Navy explains, "Note E is baked into CLIN 0054" (gov't mot. at 18; gov't reply at 16). As such, baked-in Note E becomes stage two.

The Navy further explains that the 85 days set forth in CLIN 0054 were consumed by the 225-day extension (gov't mot. at 15). When exercising the unilateral 161-day extension modification, since those days spanned November 1, 2021 through April 10, 2022, and were thus well-within the 24 months of the availability completion date, the unit price of \$5,000 applied (*id.* at 16). According to the Navy, you read FAR 52.217-7 and Note E together; thus, the Note is the "schedule" (*id.* at 15). In response, Vigor argues the Navy is turning fixed-price CLIN 0054 into an indefinite delivery, indefinite quantity (IDIQ) CLIN and notes the contract does not use those terms or include any IDIQ or ordering clauses (app. reply at 6).

⁵ This might beg the question of why the Navy would need 24 months after the availability completion date to exercise the 85-day option when the Navy presumably would exercise it immediately after the completion date (or earlier) if time needed to be extended. As one example, there is the possibility that the Navy would need extra work to be done in a dry-dock (*see* CLIN 0052) prior to the final pier-side work. The 24 months leeway would allow for that contingency.

⁶ The COFD stated that 24 months later was March 1, 2023 (R4, tab 13 at 991).

The Board held an oral argument and requested subsequent briefing seeking answers to several theories raised by the parties, especially the Navy's assertion that CLIN 0054 established a two-stage process. In its supplemental briefing, the Navy expounded on its interpretation by explaining the contract here is one for supplies (ship repair is a supply contract) and is a level of effort to completion contract (LOE2C) type which operates on a fixed-price basis using the total manhours and material costs to perform each work item to completion (gov't supp. br. at 1-3). The pre-priced options, such as CLIN 0054, allow for additional growth work and availability (*id.* at 1). The Navy uses this FAR 16.207 type contract, as modified to fit its needs (*id.* at 4). As the Navy points out, Note A is titled "Level of Effort to Completion-Ship Repair" and provides the total manhours of direct labor and associated material required to support the effort of Vigor delivering a completed vessel (*id.* at 5). While the mix of labor and material can be adjusted through performance, it cannot exceed the CLIN dollar value associated with Note A (*id.*). Note A does not apply to CLIN 0054 (SOF ¶ 7).

The Navy again states that Note E is required because when a LOE2C's period of performance is extended due to growth work, the parties also need an availability extension (gov't supp. br. at 6). Thus, Note E is a "contingency fund for time" and only comes into play when there is a government required extension; at that point, Note E outlines the terms and conditions of the extension (*id.* at 6-7). As the Navy explains, during stage two of CLIN 0054 (after the 85 days of pierside extensions are used), it "may issue as many modifications as necessary to add the required availability extension, so long as the period of performance for each extension added takes place prior to February 28, 2023" (*id.* at 8).

When interpreting a contract, the Board must read the entire contract "as a harmonious whole, if possible," giving reasonable meaning to all its parts so that no provision is rendered "useless, inexplicable, inoperative, void, insignificant, meaningless or superfluous." *ECI Constr., Inc.*, ASBCA No. 54344, 05-1 BCA ¶ 32,857 at 162,807 (quoting *Hol-Gar Mfg. Corp. v. United States*, 51 F.2d 972, 979 (Ct. Cl. 1965) (further citations omitted)); *NVT Techs., Inc. v. United States*, 370 F.3d 1153, 1159 (Fed. Cir. 2004) (citations omitted). "An ambiguity exists when a contract is susceptible to more than one reasonable interpretation." *CDM Constructors, Inc.*, ASBCA No. 60454 *et al.*, 18-1 BCA ¶ 37,190 at 181,012 (quoting *E.L. Hamm & Assocs., Inc. v. England*, 379 F.3d 1334, 1341 (Fed. Cir. 2004)). "To show an ambiguity it is not enough that the parties differ in their respective interpretations of a contract term. Rather, both interpretations must fall within a 'zone of reasonableness.'" *Id.* (quoting *NVT Techs.*, 370 F.3d at 1159).

Although the contract here is not a model of clarity, we conclude there is no ambiguity: Vigor's interpretation is reasonable and the alternative is simply not. The contract was fixed price (SOF ¶ 7). CLIN 0054 was fixed price for 85 days at a unit

price of \$5,000 per unit, which was days, for a total amount of \$425,000 (*id.*). The CLIN is for daily extensions (*id.*). The Navy exercised the option upon award (*id.*). Thus, at the time of award, the fixed-price contract included the option of 85 days total for pierside extension for the USS Chosin for a total of \$425,000 (*id.*). Neither party disputes that when the Navy exercised CLIN 0054, it was for 85 days of pierside availability extensions for a total of \$425,000 (\$5,000/day).

The issue is with the CLIN's references to the Notes. All CLIN 0054 says is "See Notes B, C, D, E and G" (SOF ¶ 7). Almost all the other CLINs also reference these notes (SOF ¶ 9). Note C explains that FAR 52.217-7 applies (*id.*). FAR 52.217-7 (MAR 1989), OPTION FOR INCREASED QUANTITY-SEPARATELY PRICED LINE ITEM, was also set forth in the contract and stated that for the daily extension rates, including CLIN 0054, the Navy may require delivery of the "numbered line item" which here was CLIN 0054, "in the quantity and at the price stated in the Schedule" (*id.*).

FAR 52.217-7 is a fill-in clause, which requires the contracting officer fill-in the time-period in which the contracting officer can exercise the option. FAR 52.217-7. Here, the contracting officer filled-in the clause and required the Navy exercise option CLIN 0054 in writing "no later than final delivery of vessel" (SOF ¶ 9).

As we read it, Note E provides specifics as to what Vigor was to include in its fully burdened rates (e.g., support services, facilities costs, project management, all wages, overhead, etc.) and this rate would be used during the extension period set forth in CLIN 0054 (*see* SOF ¶ 9). Additionally, Note E explains that the "fixed fully burdened daily rates for pierside and dry-docking are shown below" and for this contract, the rate was \$5,000 (SOF ¶ 9). Note E further states the \$5,000 rate is "to be used during the availability's extension period, up to 24 months after the Attachment J-3 and Attachment J-13 availability completion date" (*id.*). Note E does not define "availability extension period." However, CLIN 0054 explains it is for additional pierside days requiring an "Availability Extension" and then references attachment J-4 (SOF ¶ 7). Attachment J-4 was a pricing workbook the offerors completed and which was incorporated into the contract (SOF ¶ 8). It stated virtually the same as CLIN 0054--that the CLIN was for daily extensions, the additional days pierside requiring an availability extension was 85, the unit price was \$5,000 per day for a total price of \$425,000 (*id.*). Paragraph 1 of Note E explains that "[i]n the event of a Government required extension," Vigor's fully burdened daily pierside rates "will be used for negotiating additional . . . pierside performance days under this contract" (SOF ¶ 9).

When read together, CLIN 0054, FAR 52.217-7 and Note E explain that the contracting officer must exercise the option for additional pierside days in writing and

prior to final delivery of the vessel, and the rate to be used during the 85-day option extension period is \$5,000/day. Further, Note E explains that the Navy may utilize the \$5,000 rate during the “availability’s extension period” which CLIN 0054 defined as 85 days, for “anytime up to 24 months after the availability completion date.” Note E does not provide an additional 24 months or 730 days of pierside availability at \$5,000/day. Rather, Note E limits the time in which the Navy may utilize the 85-day option (had it not exercised the option at the time of award). If the Navy needed more than 85 days of pierside availability due to a government-required extension, then per Note E the Navy would use Vigor’s fully burdened daily pierside rates “for negotiating additional” days. Vigor, however, was not bound by those rates but was bound to provide all the services set forth in Note E and include them in its rates (*id.*).

Thus, we do not see that the purpose of Note E is to provide additional option days, but rather to show what was to be included in Vigor’s “unit price” or daily rate for the pierside availability (e.g., temporary services, internet connectivity, etc.) (SOF ¶ 9). There is *nothing* in the contract explaining that CLIN 0054, which specifically states it is fixed price and for 85 days, is a two-stage CLIN where the 85 days is stage one, and the “baked” into CLIN 0054 Note E is stage two. *See Lockheed Martin IR Imaging Sys. v. West*, 108 F.3d 319, 323-24 (Fed. Cir. 1997) (holding that when a CLIN says it is a 100 percent option it means just that; it does not mean it is for up to 100 percent of the option quantities).⁷

In addition, the modification for the 225-day extension incorporated by reference Vigor’s extension proposal (SOF ¶ 20). Vigor’s extension proposal became part of the contract. *Northrop Grumman Info. Tech., Inc. v. United States*, 535 F.3d 1339, 1345 (Fed. Cir. 2008) (extrinsic material incorporated by reference must explicitly state it is being incorporated and precisely identify the incorporated material).

In the extension proposal, Vigor disagreed that CLIN 0054 applied because the modification for the 225-day extension was for completely different work (the SSRA work) (SOF ¶ 19). Vigor nonetheless agreed to utilize CLIN 0054 to resolve the SSRA unfinished work (*id.*). Although the Navy attempts to downplay Vigor’s proposal (as incorporated into the modification) by arguing it relates only to SSRA and not MODPRD work (gov’t reply at 6), the plain language evidences otherwise. Vigor’s extension proposal stated that the “*final* 85 days, as defined on CLIN 0054” applied to the modification’s period of performance and the remaining 140 days was priced as outlined in the proposal (SOF ¶ 19) (emphasis added). Vigor’s extension proposal further stated that any additional extensions beyond the 225 days would be priced at the agreed upon labor rate and cost structure (*id.*). When reading the contract

⁷ If the Navy intended to bake extension days and rates into a CLIN, and create a two-stage IDIQ CLIN, it should have used plain language to explicitly state so.

as a whole, which includes Vigor's extension proposal via the modification, it confirms *both* parties' understanding that CLIN 0054 was *only* for 85 days.

At this point, having concluded that the plain language of the contract is unambiguous, we are generally precluded from considering extrinsic evidence. *TEG-Paradigm Env't, Inc. v. United States*, 465 F.3d 1329, 1338 (Fed. Cir. 2006). Nevertheless, we may and do note that the parties' contemporaneous interpretation of the contract prior to the dispute is consistent with our interpretation. *See Coast Fed. Bank, FSB v. United States*, 323 F.3d 1035, 1040 (Fed. Cir. 2003) (extrinsic evidence was not used to interpret unambiguous provision but used to show it was consistent with agreement's plain meaning); *see also Blinderman Constr. Co. v. United States*, 695 F.2d 552, 558 (Fed. Cir. 1982) (contemporaneous construction of an agreement prior to dispute is entitled to great weight); *Aegis Def. Services, LLC*, ASBCA Nos. 59082, et al, 17-1 BCA ¶ 36,915 at 179,856 (noting that interpretation of plain text had virtue of consistency with the party's pre-dispute intent). Here, two different pre-dispute actions are consistent with our interpretation.

First, the Navy's current interpretation is contrary to the way it treated the relevant provisions when it solicited and evaluated offers. The solicitation incorporated by reference FAR 52.217-5, EVALUATION OF OPTIONS (JULY 1990) (SOF ¶ 5). According to the provision, the government would evaluate offers by adding the total price for all options to the total price for the basic award. FAR 52.217-5; *see also* FAR 17.207(g). As FAR 17.207(f) explains, to satisfy the full and open competition requirements of FAR part 6 when exercising an option, "the *option must* have been evaluated as part of the initial competition and be exercisable at an amount specified in or reasonably determinable from the terms of the basic contract" (emphasis added). Thus, had Note E truly represented a back-door method to create a two-year option for pier-side services at the offered rate as the Navy now contends, that FAR section required the Navy evaluate the offers accordingly, to meet full and open competition requirements. But the Navy did not. In the solicitation, the Navy stated it would only evaluate the 85 days of CLIN 0054 and did in fact only evaluate the 85 days (SOF ¶ 5). The Navy used 85 days to ensure offerors would propose a competitive daily rate for pierside extensions and ensure the proposed daily rate had an "appropriate weight within the offeror's total evaluated price;" further, 85 days was a "reasonable forecast of the possible future extensions to be experienced during availability execution" (SOF ¶¶ 5-6). This is consistent with the plain language of CLIN 0054 that it was fixed price and for only 85 days. *See Coast Fed. Bank, FSB*, 323 F.3d at 1040.

Second, as argued by Vigor, its interpretation is consistent with the Navy's during the negotiations and subsequent modification regarding the 225-day extension, and also during some discussions on the modification at issue here (app. mot. at 27, 41). The Navy acknowledges that at one point, the ACO believed that CLIN 0054 was

for only 85 days (gov't reply at 8). The Navy states: "Evidently, the Navy changed its position at some point afterward, because [the modification at issue in this appeal] prices the extension at the CLIN 0054/Note E rate of \$5,000/day" (*id.*). According to the Navy, "this is a normal and unremarkable occurrence when any organization properly prepares for and conducts a negotiation—many viewpoints are considered, strategies are decided upon, and things can change until the deal is finalized" (*id.*). The facts show the Navy interpreted CLIN 0054 the same as Vigor prior to issuing the modification which is the subject of this appeal because it incorporated by reference Vigor's proposal with this interpretation into the 225-day extension modification (SOF ¶ 20). Other Navy correspondence also supports this fact (SOF ¶¶ 13-16). Further, the Navy's request for a proposal to Vigor for the 225-day extension "instructed Vigor to apply CLIN 054 to all RCCs for pier side support for the first 85 days of the availability extension and provide proposals for the remaining 140 days of the extension" (SOF ¶ 18).

In sum, we conclude CLIN 0054 was not ambiguous--it was exactly as it stated, a fixed price CLIN for 85 days. Accordingly, the Navy's unilateral modification was a change to the contract, issued pursuant to the contract's changes clause (*see* SOF ¶ 11).

CONCLUSION

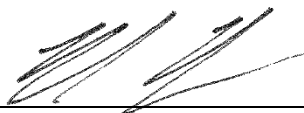
For the foregoing reasons, we deny the Navy's motion for summary judgment and grant Vigor's motion. We remand the matter to the parties to decide the quantum due Vigor consistent with our decision here.

Dated: September 24, 2026



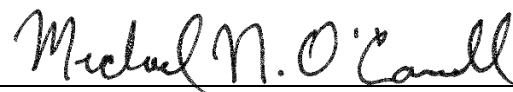
LAURA EYESTER
Administrative Judge
Armed Services Board
of Contract Appeals

I concur



J. REID PROUTY
Administrative Judge
Acting Chairman
Armed Services Board
of Contract Appeals

I concur



MICHAEL N. O'CONNELL
Administrative Judge
Vice Chairman
Armed Services Board
of Contract Appeals

I certify that the foregoing is a true copy of the Opinion and Decision of the Armed Services Board of Contract Appeals in ASBCA No. 63405, Appeal of Vigor Marine, LLC, rendered in conformance with the Board's Charter.

Dated: September 24, 2026



PAULLA K. GATES-LEWIS
Recorder, Armed Services
Board of Contract Appeals