

Board of Contract Appeals

General Services Administration
Washington, D.C. 20405

GSBCA 16079, 16132 GRANTED IN PART;
GSBCA 16487, 16490, 16491 DENIED:
April 11, 2006

GSBCA 16079, 16132, 16487, 16490, 16491

MARUT TESTING & INSPECTION SERVICES, INC.,

Appellant,

v.

GENERAL SERVICES ADMINISTRATION,

Respondent.

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

Mark R. LaFeir, Office of General Counsel, General Services Administration,
Washington, DC, counsel for Respondent.

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

NEILL, Board Judge

These five appeals concern the denial by the General Services Administration (GSA) of claims filed by appellant, Marut Testing & Inspection Services, Inc. (Marut). The claims have arisen in relation to three contracts for inspection services between Marut and GSA. Two of these cases (GSBCA 16079 and GSBCA 16132) involve claims by Marut for breach of the minimum ordering requirement in two of the three contracts. The other three cases (GSBCA 16487, GSBCA 16490, and 16491) involve requests for equitable adjustment based upon other alleged breaches of the three contracts by GSA. For purposes of this decision, we have chosen to consolidate all of Marut's disputes currently before the Board. We

considered this advisable because many of the cases involve similar issues and overlapping facts.

In making the findings of fact set out below, we have listed first those findings of a general nature applicable to the appeals addressed herein. Following these facts of general application, we have listed findings specific to each of the individual appeals. Finally, in a third section of findings, we have set out findings concerning the subsequent processing of the five appeals. In our discussion following our findings of fact, we have addressed first the merits of Marut's two appeals relating to the Government's breach of the contract's Minimum/Maximum Contract and Order Limitation clause. Following this, we discuss the three appeals involving the Government's denial of three requests for equitable adjustment filed by Marut. For the reasons set out below, we have granted Marut's first two appeals and denied the remaining three.

Findings of Fact

I. Findings of a General Nature Applicable to the Appeals Addressed Herein

Appellant's Prior Experience with GSA

1. Appellant's president, Mr. Joseph E. Marut, testified that his company, Marut, was incorporated in 1976. In the mid-eighties, his company began performing contracts for construction inspection services for GSA. These contracts covered GSA construction projects in the New York and New Jersey areas. In June 1989, GSA awarded Marut three construction inspection service contracts. These contracts expired in late June of 1993. Transcript at 137-40.

Marut's Home Office

2. Mr. Marut's company has always been a small business. The company's home office is located in Penndel, Pennsylvania. By 1993, the home office employed two men full-time in addition to Mr. Marut. Mr. Marut testified that these men worked entirely providing in-house services on the GSA construction inspection contracts. Administrative support was provided to Mr. Marut and his two associates by one or two secretaries. Transcript at 140-41.

3. Mr. Marut located his company's home office in a building which he personally owned but leased in 1989 to his company. Under the lease, the company had access to approximately 10,000 square feet of space which was used for offices, file and record retention, a conference room, and a testing laboratory. Transcript at 203-05.

The Contracts in Relation to which These Disputes Arise

4. On June 30, 1993, GSA and Marut entered into contract GS-02P-93-CUD-0014(N) (Contract 14) for construction inspection services in New Jersey. Appellant's Supplemental Appeal File, GSBCA 16079, Exhibit 27.

5. On July 12, 1993, GSA and Marut entered into contract GS-02P-93-CUD-0012(N) (Contract 12) for construction inspection services in metropolitan New York City. Appeal File, GSBCA 16132, Exhibit 1.

6. On October 28, 1993, GSA and Marut entered into contract GS-02P-93-CUD-0013(N) (Contract 13) for construction inspection services in upstate New York. Appeal File, GSBCA 16490, Exhibit 1.

7. Although Contracts 12, 13, and 14 are for different areas in New York and New Jersey and may differ among themselves in some other aspects which are not of relevance here, they are virtually identical so far as their format, structure, and provisions are concerned. *Compare* Appeal File, GSBCA 16079, Exhibit 1 *with* Appeal File, GSBCA 16132, Exhibit 1 *and* Appeal File, GSBCA 16490, Exhibit 1.

The Subject Matter of the Three Contracts

8. Each of the three contracts has the following provision regarding the subject matter:

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 . . . [upstate New York, or metropolitan New York City, or New Jersey]^[1]

1. The following Bid Schedule is for CIS personnel to perform all the services as required under the Scope of Work

¹ The text of this provision in Contract 13 differs slightly from that in Contracts 12 and 14 in that the phrase "construction inspection services" in line one is qualified by the term "Supplemental" and the contract is described in line two as a "firm fixed price indefinite quantity contract" rather than as a "firm fixed price indefinite deliver[y] contract."

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.
 - (a) Regular Time: (6 a.m. to 6 p.m., NTE [not to exceed] 8 hrs. per day or 40 hours per week)
 - (b) Premium Time (work outside 6 a.m. to 6 p.m. or in excess of 8 hrs. per day or 40 hours per week)
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, GSBCA 16079, Exhibit 1, § B at 4; Appeal File, GSBCA 16132, Exhibit 1 at 21; Appeal File, GSBCA 16490, Exhibit 1 at 4.

The Contract Price Schedules

9. The five bid schedules or offeror sheets, which follow the above-quoted provision in each of the three contracts, list, in a column on the left side of each sheet, six inspector disciplines, namely: General Construction Inspector, Mechanical Inspector, Electrical Inspector, Structural Inspector, Asbestos Abatement Inspector, and Elevator Inspector. Reading across the page from left to right, one sees after each discipline the number of regular and overtime hours involving that discipline which the Government estimates as being required for all projects. To the right of these estimates is a space where the contractor has entered an hourly rate (one for regular time and another for overtime) and then, after that entry, a total price based on the multiplication of the listed hourly rates by the Government's estimated hours for that discipline. The five offeror sheets contained in the contract cover the base year and each of the four option years. These five sheets were, of course, contained in the original solicitation and Marut's proposals which, once accepted, became part of Contracts 12, 13, and 14. The inspector disciplines and hourly estimates shown on the five sheets are the same for each of the five years. At the bottom of each sheet is 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 (i.e., the fifth year of

anticipated contract performance) is an additional space for the “Grand Total Evaluated Offer Price for Base Year, Option 1, 2, 3, and 4.” Appeal File, GSBCA 16079, Exhibit 1 at viii - xii; Appeal File, GSBCA 16132, Exhibit 1 at 8-12; Appeal File, GSBCA 16490, Exhibit 1 at 5-9.

10. Section M of the solicitations which ultimately led to the award of Contracts 12, 13, and 14 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, GSBCA 16079, Exhibit 25 at 170; Appellant’s Supplemental Appeal File, GSBCA 16132, Exhibit A-1 at 202; Appeal File, GSBCA 16490, Exhibit 1 at 171.

11. The hourly rates in Marut’s three contracts vary depending upon the type of inspection discipline involved. Nevertheless, the rates for each discipline do not vary from year to year. Since the estimated hours and unit prices were the same for each year, the total evaluated price for the base year and each option year is likewise the same and the grand total evaluated offer price appearing at the foot of the fifth sheet (option 4) is the sum of these five annual totals. Appeal File, GSBCA 16079, Exhibit 1 at viii - xii; Appeal File, GSBCA 16132, Exhibit 1 at 8-12; Appeal File, GSBCA 16490, Exhibit 1 at 5-9.

Special Conditions

12. The Special Conditions section of the solicitations which ultimately led to Contracts 12, 13, and 14 contain the following provisions which, as part of the original solicitations, have been incorporated by reference into each contract. Appeal File, GSBCA 16079, Exhibit 1 at 1 (block 18); Appeal File, GSBCA 16132, Exhibit 1 at 3 (block 18); Appeal File, GSBCA 16490, Exhibit 1 at 1 (block 18). They read 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 [C]ontracting Officer at any time during the one-year period of this contract, provided that the total ordering limitation for the one-year period i[s] 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 fo[u]rth 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 [m]aterials 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.

.....

E. Hourly Rates

1. The hourly rates for all disciplines listed elsewhere in this contract shall include all attributable costs; overhead, profit, travel, shipping and postal charges[,] all office supplies, office and telephone equipment[,] and charges for telephone calls.

2. Applicable hourly rates shall be used in individual Work Orders placed against any contract resulting from this solicitation.

3. United price extensions are for the purpose of determining the Evaluated Bid Price to be used in price evaluation.

Appeal File, GSBCA 16079, Exhibit 1 at 12, 14-16, 18-19; Appeal File, GSBCA 16132, Exhibit 1 at 29, 31-33, 35-36; Appeal File, GSBCA 16490, Exhibit 1 at 42, 45-47, 49-50.

The Contracts' Scope of Work

13. The three basic types of service to be provided by the contractor are described in detail in the scope of work for Contracts 12, 13, and 14. The scope is the same for each of the contracts. Appeal File, GSBCA 16079, Exhibit 1 at 26-33; Appeal File, GSBCA 16132, Exhibit 1 at 43-50; Appeal File, GSBCA 16490, Exhibit 1 at 57-64.

Standard Services

14. The "Standard Services" are described in particular detail in each contract's scope of work. Because of the importance of these services to these appeals, they are set out here in similar detail:

A. Perform all Standard Services covered in the contract as specified in each Work Order issued by the Contracting Officer.

B. The Construction Inspection Specialist [CIS] shall attend and take minutes of the pre-construction conference with the General Contractor. . . .

C. Make sufficient observation of the performance and progress of the General Contractor and his subcontractors performing work at the site to ascertain whether or not the General Contractor and subcontractors are complying or have complied with plans, specifications, other construction performance requirements of the contract and sound construction practices.

D. Without delay, inform the COR [contracting officer's representative] and the General Contractor (GC) as well, of any failure of any contractor or his subcontractors to follow sound construction practices or to comply with the requirements of the plans, specifications or other construction contract documents. Promptly reject orally all construction work or materials delivered that do not comply with contract requirements, and notify the COR. . . .

E. During the life of the construction contract, prepare and maintain a running list of observed items which remain at variance with contract requirements. . . .

F. Follow through to assure that all defects and omissions noted at [t]he time of final inspection have been corrected or completed. Maintain a master copy of the official list of defects and omissions (punch list).

G. Without delay, inform the COR, and the responsible contractor as well, of any violation by any contractor or by his subcontractors, which the CIS personnel may observe, of applicable provisions of Federal, State or Municipal safety laws, ordinances or regulations.

H. Investigate progress or performance problems encountered by any Contractor or his subcontractors, keeping the COR informed as to any contractor's lag in progress sufficient to indicate the possibility or probability of failure to complete the construction contract on time and advise or make recommendations (as appropriate) to the COR with respect to solutions to performance or progress problems. . . .

I. Prepare progress inspection reports, daily logs and documentation of inspections. Include all significant events related to the construction contract so as to provide a complete record of all significant on-site events.

J. Respond promptly to all questions from General Contractor or his subcontractors regarding the requirements of the construction contract documents, provided, however, that any question which cannot be readily answered by reference to the contract documents shall be referred, together with comments and recommendations of the CIS, including any scope of work changes and/or explanatory sketches, to the COR who shall, as promptly as may be feasible, furnish the contractor with a response to the question, an interpretation of the contract documents, or such instructions or directive as he may deem appropriate. . . .

K. Maintain a log of required submittals and record dates submitted and action taken. Monitor the submittal process to ensure timely submission and approval of shop drawings, material samples and other submittals. Notify in writing, any party delaying any submittal and notify the COR.

L. Maintain a logically organized construction file and preserve all incoming and outgoing communications. All originals and official file copies of all correspondence and contract documents shall be forwarded to the COR for placement in the official contract file.

M. Make recommendations to the COR whenever contract clarifications are required.

N. Whenever a change appears to be necessary, assist the COR in preparing the Request for Proposal (RFP) including estimates. Review the Contractor's Proposal and assist the COR in Change Order Negotiations.

O. Ensure that the construction contractor has prominently posted on the job site the schedule of wage rates and any additions or amendments to it. Periodically interview workers for proper classifications and correct wages, utilizing GSA form 1445, Labor Standards Interviews and forward to the COR.

P. Inform the COR of the status of construction and of all activities that might affect the Building Manager or the occupant agency personnel.

Q. Keep the Government advised of potential disputes (with analysis and recommendation of action to be taken). . . .

R. When directed by the COR, the CIS shall photograph any condition which could cause a possible Change Order or claim against the Government. . . .

S. Review all requests for payment submitted by the construction contractor for progress payments and final payment and submit recommendations concerning approval thereof to the COR. . . .

T. Schedule, conduct and take minutes of progress meetings as required by the COR with all concerned parties to review the project and to discuss and resolve potential or ongoing problems.

U. Enforce the safety requirements set forth in the GSA Handbooks, including "Accident and Fire Prevention", latest edition. . . .

V. [E]nsure that the contractor maintains a marked-up set of contract drawings which show actual installations which vary from the work as originally shown.

W. All records necessary for the field performance of construction contract administration, including inspection, will be maintained on the project site. These records are the property of the Government and will be handled on an "official use only" basis. They will not be removed from the project site unless directed by the COR. They will be maintained and stored in a secure

area and will not be accessible to other than those individuals who may be specifically authorized to use them.

Appeal File, GSBCA 16079, Exhibit 1 at 26-30; Appeal File, GSBCA 16132, Exhibit 1 at 43-46; Appeal File, GSBCA 16490, Exhibit 1 at 57-60.

Special Services

15. The contract's scope of work describes "Special Services" simply by providing a brief list of examples, such as laboratory testing, serving as an expert witness, serving as a special consultant, and providing professional progress photographs. What is significant about this type of service is that a payment fee must first be established by contract amendment before any special service can be ordered. Where the contractor possesses the in-house capability of performing the special service, the contractor will propose and negotiate a payment fee with the contracting officer who will then issue a contract modification stating the fee to which the parties have agreed. Where the contractor lacks the in-house capability to provide the special service, the contractor will seek bids from three qualified sources and the contracting officer will then select one of the three and thereupon issue a contract modification based upon the offer selected. Appeal File, GSBCA 16079, Exhibit 1 at 30-31; Appeal File, GSBCA 16132, Exhibit 1 at 47-48; Appeal File, GSBCA 16490, Exhibit 1 at 61-62.

Shop Drawing-Review and Submittal Review and Drafting Services

16. The general nature of the third type of service described in the contract scope of work, "Shop Drawing-Review and Submittal Review and Drafting Services," is, for the most part, clear from the title itself. Like special services, none of the third type of service may be ordered unless a payment fee has first been established by contract amendment. If the contractor possesses the in-house capability to provide the service, the fee is first proposed by the contractor and negotiated by the parties. If the contractor does not possess the in-house capability, a procedure similar to that followed in such cases for a special service is followed. Appeal File, GSBCA 16079, Exhibit 1 at 31-33; Appeal File, GSBCA 16132, Exhibit 1 at 48-50; Appeal File, GSBCA 16490, Exhibit 1 at 62-64.

Inspection of Services-Fixed-Price Clause

17. Contracts 12, 13, and 14 also contain a clause entitled: "Inspection of Services-Fixed-Price." The 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, GSBCA 16079, Exhibit 1 at 23;

Appeal File, GSBCA 16132, Exhibit 1 at 40; Appeal File, GSBCA 16490, Exhibit 1 at 54.

Renewal and Expiration of the Three Contracts

18. In 1994, when the base year for Contracts 12, 13, and 14 was due to expire, GSA renewed each for an additional year (first option year). Renewal options were likewise exercised in 1995 for an additional year (second option year). Renewal options were not exercised, however, in 1996. Appeal File, GSBCA 16079, Exhibits 1-3; Appeal File, GSBCA 16132, Exhibits 1-3; Appeal File, GSBCA 16490, Exhibits 1-3; Respondent's Trial Exhibit 2 (Declaration of Joseph E. Marut II (July 30, 2003)) ¶ 63.²

19. A GSA employee, who served as a COR during the period that Marut's three contracts were in effect, testified that an internal reorganization within GSA in 1995 put CORs in closer proximity to the projects for which they were responsible. This made it possible for them to do more inspections themselves and thus reduced the need for CIS contractors such as Marut. Transcript at 1018-21, 1057.

Contract Performance and Payment

20. Mr. Marut has testified that it was more or less the practice of GSA to send Marut a copy of construction contracts awarded for the regions covered by Marut's CIS contracts. On receipt, these contracts would be filed by Marut with materials relating to the particular CIS contract in whose territory the construction was to take place. Receipt of a construction contract, however, did not necessarily mean that Marut would be asked to provide its services with regard to that particular construction project. Sometimes there would be a preconstruction conference to which a Marut representative would be invited. Sometimes Marut would not be asked to attend the conference. Sometimes nothing more would be heard from GSA regarding the contract. At other times, Marut might be called in to assist on some particular aspect of the construction project. Transcript at 306-11.

21. When a representative of Marut was invited to a preconstruction conference, one principal purpose of the conference was for a GSA representative (usually the COR) to explain to the new construction contractor what role Marut would be playing as the CIS contractor with regard to performance of the construction contract. The record contains

² This declaration, although introduced and admitted as a trial exhibit during the course of the hearing for these appeals, was already part of the record inasmuch as it had been previously introduced in support of appellant's opposition to the motion for summary relief filed by respondent in GSBCA 16079.

copies of the agenda for some of these contracts. Typically, the responsibilities of the CIS contractor are described in these agendas as follows:

The CIS [Contractor] generally shall:

1. Observe the performance and progress of the contractor to ascertain whether or not the contractor is complying with contract requirements.
2. Promptly reject all construction work that does not comply with the contract requirements.
3. Respond to questions from the contractor regarding the requirements of the contract documents.
4. Monitor the submission and approval process of the contractor's required shop drawings and samples to assure that the submissions and approvals are timely and complete.
5. Inspect materials delivered for compliance with contract requirements.
6. Review the Contractor's request for payment, prepare required forms and recommend payment to the C.O. [contracting officer.]
7. Insure that all defects and omissions are corrected.
8. Provide for testing services, as required.
9. Periodically interview workers for proper classifications and correct wages utilizing GSA Form 1445. Labor Standards Interview.
10. Monitor construction schedule, determine and report monthly progress, make recommendations relative to changes in schedules, including determination concerning lag or delay in schedule.

Consolidated Appeal File Supplement, Vol. 13, Exhibit 905; *see also Id.*, Vol. 3, Exhibit 565.³

22. At hearing, the contracting officer assigned to Contract 13 was asked if the various responsibilities listed in the above-quoted preconstruction conference agenda as belonging to the CIS contractor were, in her opinion, outside the scope of Marut's contracts. Her ultimate conclusion, after a detailed review of the scope of work contained in Marut's

³ Once the determination was made to consolidate, for purposes of hearing and decision, the five appeals which are decided here, the parties were given leave to file consolidated supplements to the appeal files for the five cases in question. Appellant filed eighteen volumes of additional documentation and the Government filed two. The appellant's volumes are numbered from 1 to 18, while the two volumes filed by the Government are numbered 19 and 20. They are cited herein as "Consolidated Appeal File Supplement, Vol. __, Exhibit __."

contracts, was that these responsibilities did fall within the scope of contract work. Transcript at 864-73. On review of the documents themselves, we arrive at the same conclusion. *Compare* Findings 13, 14 with Finding 21.

23. With regard to the issuance of work orders under his contracts, Mr. Marut testified: “Yes, we always got work orders for the field inspectors. And we were paid for those field inspectors.” Transcript at 156. He further explains that, if a work order had not been issued by the time a preconstruction conference was convened on site, he would personally attend the conference and review the site. *Id.* at 155-64.

24. During the direct examination of Mr. Marut, his counsel led him through the list of standard services set out in the scope of work for Marut’s three contracts with GSA. *See* Finding 14. Counsel’s purpose in doing so was to give Mr. Marut the opportunity to comment on which services would primarily be rendered by the field inspector on site and which instead would be rendered primarily by the home office. From this testimony it is clear that Mr. Marut did not rely heavily upon his field inspectors to provide many of the standard services identified in the scope of work for his company’s contracts with GSA. Transcript at 155.

25. Mr. Marut explained that the field inspector was responsible for the actual construction at the site and would be expected to report to the COR on whether the contractor had posted the schedule of wage rates at the site, whether the positions of the contractor’s employees were properly classified, and whether the employees were receiving proper wages. Administrative and interpretive matters, however, were reserved to the home office in Penndel. The field inspector was said to have nothing to do with regard to matters such as maintaining a log of submittals and monitoring the submittal process. As for making recommendations to the COR on contract clarifications or changes, or assisting the COR in change order negotiations, Mr. Marut explained that this was not even something which a field inspector would be competent to perform. Transcript at 155-82.

26. The record contains instructions, sent to one field inspector assigned to a particular project, which make it abundantly clear that the inspector should concern himself solely with items 2, 5, and 9 set out in the typical preconstruction conference agenda, Finding 21. The instructions go on to state:

Under no circumstances do you provide a final D&O [defects and omissions] list to the contractor or any other documentation. Have GC [general contractor] call Penndel with any questions. Remember you are an inspector not anything else

Consolidated Appeal File Supplement, Vol. 3, Exhibit 605 at 2 (unnumbered). When asked about this particular instruction, Mr. Marut testified that this was “typical of all instructions that I gave to my site construction inspectors.” Transcript at 387.

27. So far as the work done by Marut at its home office was concerned, Mr. Marut contended: “[W]e approved the drawings, we approved the change orders, we approved the submittals, we prepared everything for the COR because he was the one that could represent the government and actually sign the change order.” Transcript at 174. When asked by the Board if this did not, in effect, render the COR and the contracting officer little more than a rubber stamp, Mr. Marut observed that, simply by asking the question, the Board may well have answered the same. *Id.* at 175.

28. Testimony provided later at the hearing by a COR who worked with Marut on a project in metropolitan New York paints a different picture regarding home office involvement in the work of Marut’s field inspectors. The project in question was the renovation of the heating, ventilation and air conditioning (HVAC) system of the Food and Drug Administration’s laboratory in Brooklyn, New York. The project began in October 1994, prior to GSA’s internal reorganization, Finding 19. Transcript at 1021, 1029, 1033.

29. This same COR testified that, for this project, Marut’s field inspector generally interfaced with the construction contractor and reported to the COR at least three times a week. Transcript at 1025. Given the nature of the project, the COR explained that, in his opinion, Marut’s inspector should have had a mechanical type background and some minor electrical experience as well. Instead, he determined from conversations with the inspector that the latter was a former film editor. The inspector, however, proved useful and even assisted in some preliminary phases of negotiations with the construction contractor. Transcript at 1034-36.

30. This COR remembered seeing Mr. Marut only once during the HVAC project and that was during the preconstruction conference. He did not recall dealing with anyone from Marut’s home office on any matter except billing. Transcript at 1031-33; *see* Finding 36 *infra*. This witness further testified that it was his expectation that the work done by Marut for the project would be done on site. The submittals, after review and distribution by the Architectural and Engineering firm assisting with the project, were used at the site. A room was set aside there where drawings, plans, and specifications were retained for review and use. This COR explained that he could not imagine anything that Marut, as the CIS contractor, would be expected to do off site. *Id.* at 1027.

31. This COR expressed some surprise when questioned whether Marut had ever asked to be paid for storing documents off site. The COR stated that he had gotten no such

request and questioned the logic of storing documentation to which he and the field inspector would need access while working on site. Transcript at 1038-40.

32. In her testimony, the contracting officer for Contract 13 spoke of the need for the issuance of a work order before a CIS contractor can be paid. She also explained that if a CIS contractor, such as Marut, were to do work outside what was requested in a work order, the contractor should notify the contracting officer so that the matter could be investigated and the work order amended if deemed necessary. Transcript at 752-53. In addition, this contracting officer explained how the estimated number of hours in a work order issued for a specific project would be monitored by the COR assigned to the project in question. Finally, she explained that Marut's inspectors were expected to sign in when present at the work site and that these sign-in sheets would be reviewed for accuracy when submitted as backup for Marut's invoices for payment. *Id.* at 750-51.

33. This same contracting officer was asked if the provider of inspection services could invoice for work within the scope of a specific work order but done off site. Initially, the witness found the question difficult to understand since, in her mind, the work called for in the work order is specifically related to the site where the work to be inspected is located. She eventually concluded, however, that, if the task in question was one that could be done away from the work site, the inspector, in the absence of some agreement from the contracting officer, would run the risk of not being paid for the work in question. Transcript at 771-73. When asked about the costs of staff support for an inspector working at the site, this witness explained that such costs should be included in the inspector's hourly rate. She explained that the hourly rate was to be a fully loaded rate inclusive of overhead, profit, labor, and the like. *Id.* at 770-71.

34. The importance of the field inspector's sign-in sheets as support for invoices was discussed at some length during the testimony of the contracting officer for Contract 13. Transcript at 786-97. The record contains documentation rejecting in part an invoice submitted by Marut for an inspector's services because of a conflict in sign-in sheet entries for the period of time in question. Appeal File, GSBCA 16490, Exhibits 25-26.

35. The COR for the Brooklyn HVAC project also testified regarding the critical importance of sign-in sheets as back-up for a CIS contractor's invoices. He explained that when he first started to work as a COR, a veteran COR had advised him to get a notebook in which to record the comings to and goings from the site of field inspectors. While the data collected by the COR might not serve to question time claimed by the inspector when the COR was not present, it would at least serve as a basis for questioning invoices claiming time when the COR's personal record showed the inspector had not yet arrived or had already left the site for the day. Transcript at 1031.

36. This same COR further testified that, during the HVAC project, he had occasion to discuss by phone with Mr. Marut some invoices in which the time claimed for a field inspector's services did not agree with data the COR had in his own personal records regarding the presence of the same inspector at the site. Transcript at 1031-32. In general, this COR complained of the difficulty in getting Marut to submit timely invoices. With the passage of time and transfer of personnel, it was sometimes difficult to confirm the accuracy of the time claimed or the work claimed as performed. *Id.* at 1032-33. The record contains invoices dated May 6, 1996, for work done during the first three months of 1995. Consolidated Appeal File Supplement, Vol. 20, Exhibit 20-14. Although the COR believed that these invoices may have been submitted somewhat earlier, he recalled that it was a resubmission based on the fact that he had previously rejected the invoices on the grounds that the time claimed did not correspond to entries in his own personal record of when the field inspector was present at the site. Transcript at 1031-33.

37. During his cross-examination, Mr. Marut was asked repeatedly by government counsel whether, during the life of his contracts, he ever submitted invoices for all the services that he performed for which he alleges he was not paid. In responding to the question, Mr. Marut preferred to focus on claims made for payment after expiration of the contracts. At the insistence of the Board that he answer the question of whether, *during the life of the contract*, he had submitted invoices for these services, he eventually replied: "No, because GSA never issued me a work order to do that" Transcript at 1203-06. Marut's claim at this point, therefore, is for the cost of services for which he allegedly has not been paid and not for any amounts that might be due pursuant to any work order for the services of a field inspector. *Id.* at 566-80.

38. In mid-July of 1993, Mr. Marut was directed by GSA to assist in a project involving the repair and cleaning of the exterior facade of a federal building in Albany, New York. The record shows that a Marut inspector was assigned to this project. Nevertheless, Mr. Marut contends that no work order was ever issued for this project and that his company was never compensated for services it may have provided. Consolidated Appeal File Supplement, Vol. 18, Exhibits 984-85; Transcript at 1382, 1402-03.

39. When asked about the hourly rates in his proposals, Mr. Marut, taking the example of the hourly rate proposed for a general construction inspector, explained that the hourly rate included the cost of the inspector getting to the job site, meals, fringe benefits, salary, postage -- basically any particular need of the inspector at the project site. No general overhead costs were included in this hourly rate. Neither did it contain any costs associated with reviewing or filing the inspector's work at the home office. Transcript at 213-14. Mr. Marut went so far as to say that these hourly rates were "substantially discounted." *Id.* at 221. On the other hand, when asked what portion of the hourly rate related to the general and administrative expenses (G&A) attributable to the Pennel

building, he replied: “A very small percentage because, essentially, these costs were for the cost of an inspector at the job site. It included his salary, his fringe benefits, vacation, anything.” *Id.* at 214.

40. Mr. Marut has testified that he does not recall that during the life of his contracts (i.e., Contracts 12, 13, and 14) a work order was ever issued calling for special services or review of submittals and drawings as that work is described in the contract’s scope of work, Findings 15-16. Transcript at 1158-76, 1186.⁴

41. During his initial direct examination, Mr. Marut contended that, at the time of contract performance, he believed that, since he had a firm fixed price contract, he would receive for each year of contract performance the total estimated value of the contract for that year, regardless of whether any services were ordered by GSA during that year. The prices in the schedule of hourly rates, therefore, had nothing, in his mind, to do with the overall price to be paid to him on the contract each year except that he did not believe that payments made under the contract could exceed the grand total evaluated price of the contract for the base year and the four option years. Transcript at 220-21, 225.

42. When, subsequent to the expiration of his contracts, the Board ruled that these contracts were indefinite delivery/indefinite quantity contracts and not fixed price contracts in the sense Mr. Marut believed them to be, Findings 45, 58 *infra*, Mr. Marut commenced to argue, in the alternative, that the Government should issue a global work order to pay for the services rendered above and beyond the work orders issued for field inspectors. Transcript at 217. It is apparently his belief now that anything over and above amounts actually paid to Marut for the services of field inspectors, but within the grand total evaluated price for the base year and all option years of his contract, should be available to fund the cost of services provided off site by Marut’s home office -- even in the absence of any contract price for such services. *Id.* at 215-17.

⁴ The record contains a letter to Mr. Marut from a GSA staff attorney. It is dated April 23, 1996. In it, the attorney confirms his earlier telephone request that Mr. Marut provide him with any documentation he might have on a project for which Marut provided services under a predecessor contract. The letter refers to the possibility of litigation with the construction contractor and asks Mr. Marut about his availability and that of some of his staff for an upcoming hearing. Consolidated Appeal File Supplement, Vol. 14, Exhibit 917. Nothing in Mr. Marut’s testimony regarding this brief interaction with the GSA staff attorney convinces us that, on this occasion, Mr. Marut was serving as an expert witness, as that term is used in the description of special services in the contracts’ scope of work. *See* Transcript at 1235-37.

43. In a somewhat puzzling exchange with government counsel during cross-examination, Mr. Marut appears to have first testified that, under his company's contracts with GSA which predated Contracts 12, 13, and 14, such a global work order had been issued. On further examination, however, he admitted that one had not been issued. Transcript at 660-62.

The Board's Decision in GSBCA 15412

44. A little less than four years after the expiration of Contract 13, Marut sent a claim to the contracting officer requesting payment of \$1,888,506.74. This figure represented 125% of the combined prices of the base year and all four option years of Contract 13 less amounts actually paid to Marut on the contract. The claim was certified and a final decision of the contracting officer on the claim was requested. The contracting officer rejected the claim on the ground that the amount sought exceeded what the Government owed Marut. The contracting officer recognized that, because Contract 13 had been under-utilized, Marut was due some money under the contract's Minimum/Maximum Contract and Order Limitation clause (Finding 12 (Clause VI)). The contracting officer calculated this amount to be \$35,309.04. Marut appealed the contracting officer's decision to this Board and continued to press for payment of the original claim. Marut's appeal of the contracting officer's decision was docketed as GSBCA 15412. While this dispute was pending, the \$35,309.04 acknowledged to be due by the contracting officer was paid. Marut accepted the payment as partial satisfaction of its claim. *Marut Testing & Inspection Services v. General Services Administration*, GSBCA 15412, 02-2 BCA ¶ 31,945, at 157,818-19.

45. The Board rejected Marut's contention that it was entitled to payment of 125% of the total evaluated price of its contract for the base year and all four option years of the contract -- less amounts already paid. Marut's theory of recovery was apparently based in part on its contention that its contract was an indefinite delivery requirements contract that had been breached by the Government. The Board disagreed and concluded, by decision dated August 2, 2002, that the contract was an indefinite delivery/indefinite quantity contract. *Marut Testing*, 02-2 BCA at 157,820-21.

46. The Board did agree with the contracting officer that, for the three years that Contract 13 was in existence, the Government was indebted to Marut under the contract's Minimum/Maximum Contract and Order Limitation clause. However, the Board concluded that the contracting officer has incorrectly calculated the amount due to Marut for GSA's failure to place the minimum number of orders. Citing a decision of the United States Court of Appeals for the Federal Circuit, *White v. Delta Construction International, Inc.*, 285 F.3d 1040 (Fed. Cir. 2002), the Board explained 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. By paying Marut the full amount of what it would have received had the minimum amount of orders been placed, GSA placed the contractor in a better position than it would have occupied had it received the minimum guaranteed amount of orders. *Marut Testing*, 02-2 BCA at 157,823.

47. In the absence of proof of any other damages, therefore, the Board concluded that Marut was entitled to nothing more than the profit it would have earned had the requisite number of orders been placed and paid for under Contract 13. Since Marut had earned a profit of nearly 11% during the year prior to contract award, the Board found Marut's expectation of a profit of 10% on the newly awarded contract to be reasonable. In the absence of proof of any other damages, therefore, the Board held that Marut was entitled to no more than a lost profit on the amount not ordered. The Board calculated this amount to be \$4262.63. *Marut Testing*, 02-2 BCA at 157,823.

II. Findings Regarding the Five Individual Appeals

GSBCA 16079

Marut's Claim

48. Contract 13 was not the only contract in relation to which Marut sought to file a claim. A claim similar to that filed under Contract 13 was also filed by Marut in connection with Contract 14. Initially, Marut followed the same rationale for this claim as it had used for the claim filed under Contract 13, namely, 125% of the combined evaluated prices of the base year and all four option years of the contract less amounts actually paid to Marut on the contract. Respondent's Trial Exhibit 2 (Marut Declaration) ¶ 66.

49. Following the Board's decision in GSBCA 15412 on August 2, 2002, Marut revised the claim it had previously submitted under Contract 14. This time, Marut based its claim on 10% rather than 125% of the combined evaluated prices of the base year and all four option years of the contract less amounts actually paid to Marut on the contract. In addition, Marut divided its original claim into three separate claims, each covering one of the three years Contract 14 was in existence. Appeal File, GSBCA 16079, Exhibit 8 at 7.

The Contracting Officer's Denial of Marut's Claim

50. In a decision dated December 4, 2002, the contracting officer rejected Marut's revised 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 10% minimum guarantee based upon the grand

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 any year, during the life of the contract, in which GSA failed to meet the minimum order requirement. Marut's total evaluated offer 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 and paid Marut \$39,796.32 -- 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, GSBCA 16079, Exhibit 9.

51. 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 years 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 nothing more than a lost profit of 11% on the guaranteed order amount of \$15,533.05 for each year.⁵ This determination was said to be based upon the conclusion reached by the Board in GSBCA 15412 that appellant was entitled to recover its lost profit based upon a similar violation of an identical provision in another contract it had with GSA. Appeal File, GSBCA 16079, Exhibit 9.

52. 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, GSBCA 16079, Exhibit 9.

Marut's Appeal

53. Although the contracting officer issued a single decision rejecting Marut's three claims, Marut, in appealing the decision, filed an individual notice of appeal regarding each of its three claims. Appeal File, GSBCA 16079, Exhibit 10. Notwithstanding the filing of three notices of appeal, the Board docketed the notices as a single case, GSBCA 16079,

⁵ We note in passing that the contracting officer's use of 11% to calculate lost profit here and in the decision described in GSBCA 16132, Finding 83, rather than 10%, which we used in GSBCA 15412, is apparently based upon an incorrect reading of our decision. See Finding 47.

because only one contracting officer's decision was at issue. In the months which followed, Marut filed three extremely complicated complaints regarding its three claims. Government counsel, finding them to be "neither simple nor concise nor direct," *see* Rule 107(b) (48 CFR 6101.7(b) (2005)), entered a general denial.

54. In reply to the Government's comments regarding the complexity and vagueness of appellant's description of its claims in the three complaints filed, Marut, by letter to the Board dated June 3, 2003, submitted a series of twelve invoices allegedly prepared "in an effort to alleviate this problem." Appeal File, GSBCA 16079, Exhibit 17. 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 Special Services for the same period, and the third was for 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 life of the contract. *Id.*

The Government's Motion for Summary Relief

55. On June 25, 2003, the Government moved for summary relief with regard to Marut's three claims covering the base year of performance and the first and second option years. On July 15, 2003, counsel for appellant (which until this time had been represented by appellant's president, Joseph Marut) entered his appearance in this case.

The Government's Motion to Dismiss

56. Various statements made by Marut's president in a declaration by him which was attached to appellant's opposition to the Government's motion for summary relief prompted the Government to file, on August 18, 2003, a motion to dismiss Marut's appeal. The Government argued that the claim described by appellant's president differed essentially from those originally presented to the contracting officer and, therefore, had never been addressed in a contracting officer's decision.

57. By decision dated October 6, 2003, the Board denied the Government's motion to dismiss. *Marut Testing & Inspection Services, Inc. v. General Services Administration*, GSBCA 16079, 03-2 BCA ¶ 32,382. In denying the motion to dismiss, we stated that we remained convinced that appellant's president, who had only recently secured the services

of counsel, did not intend to change the essential nature of the company's original claims. We understood that the basic thrust of Marut's case was still to seek relief under the contract's Minimum/Maximum Contract and Order Limitation clause. As such, any relief sought would, of necessity, be subject to the clause's limit of 10% of the total evaluated offered price for any one year of the contract. *Id.* at 160,271-73. In denying the Government's motion to dismiss, however, we expressly stated that it was our intent to remain focused on Marut's basic claim. In this regard, we wrote: "We have no intention of permitting appellant in this proceeding to expand its claim for relief beyond what is afforded under that provision." *Id.* at 160,273.

The Government's Motion for Summary Relief

58. In the same decision of October 6, 2003, the Board granted in part the Government's motion for summary relief. In our decision, we rejected Marut's method of formulating its claims under the Minimum/Maximum Contract and Order Limitation clause, and in doing so, we expressly rejected a fundamental assumption which ran throughout all of Marut's various formulations of its claims. That assumption was that, because the contract is said to be a fixed price contract, the contractor is entitled to an annual fixed price payment based upon some percentage of the total evaluated bid price. We noted that the contract was an indefinite quantity/indefinite delivery contract and was fixed price only to the extent that the hourly rates for inspectors are fixed. *Marut Testing*, 03-2 BCA at 160,273-74.

59. In granting partial summary relief, we affirmed the contracting officer's interpretation of the Minimum/Maximum Contract and Order Limitation clause and the method used by him to determine whether the minimum ordering requirement had been met for any given year. With regard to the base year, any dispute between the parties turned not on the number of orders issued and paid for, but rather, on whether that number was itself sufficient to meet the requirements of the clause. Under Marut's interpretation, the minimum requirement had not been met. Under the contracting officer's interpretation, it had been met. Finding 50. Having affirmed the correctness of the contracting officer's interpretation, we granted the Government's motion for relief from Marut's claim for the base year. *Marut Testing*, 03-2 BCA at 160,275.

60. With regard to the first and second option years, the contracting officer had concluded that the minimum ordering requirement had not been met. He was disposed, therefore, in accordance with the guidance provided by the Board in GSBCA 15412, to allow Marut lost profit on the required orders not issued and paid for. We denied the Government's motion for relief from Marut's claims for the two option years, however, because we remained in doubt as to the existence of other damages beyond lost profit which Marut may have suffered as a result of the Government's failure to meet its obligations under

the Minimum/Maximum Contract and Order Limitation clause. It is, of course, true that, in GSBCA 15412, we concluded that Marut was entitled to lost profit. However, as we stated at the time, this was a conclusion we reached in the absence of proof of any other damages. Finding 47. Given the lack of certainty on this issue, we deemed it best to accord Marut the opportunity to present evidence on other possible damages before rendering a decision on the merits of Marut's claims. *Marut Testing*, 03-2 BCA at 160,275-77.

61. An additional reason for denying the Government's motion with regard to the second option year was the unresolved question of whether Marut remained unpaid for work done under three work orders issued during that year but later withdrawn. *Marut Testing*, 03-2 BCA at 160,276.

Further Development of the Record for This Case

62. On October 16, 2003, shortly after the Board issued its decision regarding GSA's motion for summary relief and motion to dismiss, the Board convened a conference with counsel for the parties. Counsel for appellant was invited to supplement the record with evidence of damages resulting from the Government's breach of the contract's Minimum/Maximum Contract and Order Limitation clause and evidence of work done under the three work orders which were canceled subsequent to their issuance. It was also agreed that actual supplementation of the record would be delayed until the conclusion of formal and informal discovery. Board's Conference Memorandum, GSBCA 16079 & 16132 (Oct. 17, 2003).

63. Following the status conference of October 16, counsel for the Government served written discovery requests on appellant. The requests went unanswered and no supplement to the appeal file was provided by appellant regarding damages allegedly sustained as a result of the Government's breach of the Minimum/Maximum Contract and Order Limitation clause or work done under the three work orders. On February 26, 2004, the Board convened another status conference to determine why appellant had not responded either to the Government's discovery request or to the Board's invitation to supplement the record with evidence of damages allegedly sustained and work performed.

64. In reply to the Board's inquiry, counsel for appellant explained that his client had provided him with a large quantity of materials to use in preparing an answer to the pending discovery requests and to the Board's inquiry regarding damages. Counsel advised the Board, however, that he had set March 15 as a deadline for responding to the Government's discovery requests. Board's Conference Memorandum, GSBCA 16079 & 16132 (Mar. 1, 2004).

65. With regard to evidence of damages, the Board reminded counsel for appellant that, as already indicated in the decision regarding the Government's motion to dismiss, it would consider only damages allegedly flowing from the Government's breach of the Minimum/Maximum Contract and Order Limitation clause. In denying the Government's motion to dismiss, the Board had expressly stated that it was doing so on the assumption that appellant's revised and original claims were based upon an alleged breach of that clause. Counsel for Marut was warned that if his client is in the process of gathering evidence of damages resulting from an alleged breach of some other provision of the contract, then his client would be well advised to submit a separate claim for the contracting officer's consideration. Conference Memorandum (Mar. 1, 2004).

66. In the meantime, the Board recommended to counsel for appellant that, in responding to the Government's pending discovery requests, he provide a specific list of all damages he believed appellant suffered as a result of the Government's failure to order the minimum quantities called for under the Minimum/Maximum Contract and Order Limitation clause. It was the Board's understanding that such a list would include the lost profits and performance costs which the Board had discussed in its decision granting partial summary relief. *See Marut Testing*, 03-2 BCA at 160,276. With the Board's whole-hearted support, counsel for GSA also asked that appellant identify in its response whether any of the costs listed was incurred as a result of an oral or written directive received from the contracting officer or some other Government representative. Counsel agreed to provide this information. Conference Memorandum (Mar. 1, 2004).

67. During the Board's status conference with counsel on February 26, 2004, counsel were also advised that another appeal involving Marut, *Marut Testing & Inspection v. General Services Administration*, GSBCA 16132, had recently been transferred to the same three-judge panel to which GSBCA 16079 was assigned. The Board explained that this had been done for purposes of efficiency since the issues involved in GSBCA 16132 were identical to those in GSBCA 16079, notwithstanding the fact that different contracts were involved.⁶ Counsel for appellant was then asked if he intended to re-litigate in GSBCA 16132 those issues which had already been addressed by the Board in its decision granting partial summary relief in GSBCA 16079. Counsel replied that he did not believe this would be in anyone's interest. Instead, he agreed to prepare for GSBCA 16132 a list, similar to that which he had already agreed to prepare for GSBCA 16079, of damages resulting from the Government's breach of the contract's Minimum/Maximum Contract and Order Limitation clause. Conference Memorandum (Mar. 1, 2004).

⁶ The contracts involved are Contract 12 (GSBCA 16079) and Contract 14 (16132).

68. On April 21, 2004, counsel for appellant submitted to Government counsel and the Board what was purported to be: (1) a list of specific damages sustained as a result of the Government failing to comply with the contract's Minimum/Maximum Contract and Order Limitation clause and (2) documentation and information regarding individuals who allegedly directed appellant either orally or in writing to incur these costs. Appellant's Responses to the Government's Revised Discovery (Apr. 21, 2004).

69. The information provided in this submission regarding damages, however, is nothing more than a summary spreadsheet which Marut contends "contains total contract damages for all contracts Marut had during the time in question with the GSA." Appellant's Responses to the Government's Revised Discovery at 1. These costs are broken out by calendar year and cover a five-year period from 1993 to 1997. *Id.*, Exhibit 1. Appellant further explains that the specific damages resulting from the breach of *each* individual contract's Minimum/Maximum Contract and Order Limitation clause would have to be further calculated from the summary data provided by "applying allocability and allowability analyses" to the data provided. Appellant also states in this same reply that it assumed that its claim will be audited and that it would be easier to perform such calculations at that time. *Id.* at 2. In submitting this summary data, appellant writes:

Finally, the spreadsheet summarizes information Marut possesses in greater detail. Marut has invoices, checks, individual breakdowns of costs and other evidence supporting numbers asserted on the spreadsheet. These can be provided to the government upon request or pursuant to audit, which Marut believes GSA will want.

70. Appellant's submission of April 21, 2004, also acknowledged that Marut's recovery under GSBCA 16079 and GSBCA 16132 "could be limited by the order limitation." Nevertheless, the summary spreadsheet included in this April 21 submission was also said to be supportive of allegations, to be made in the near future, of "greater breaches" regarding each of its GSA contracts. Appellant's Responses to the Government's Revised Discovery at 2.

71. In early June 2004, as indicated in its submission of April 21, Marut filed its claims of "greater breaches." These claims were in the form of a request for equitable adjustment (REA) for each of Marut's three contracts. The rationale for each of the three REAs is basically the same. Marut first notes that it fully performed each of the contracts for the base year and for option year one and option year two.⁷ Marut then contends that its

⁷ For Contract 14, Marut even claims to have fully performed for a fourth year as well (option year three). This contention is apparently based upon an inadvertent call for services

performance was in accordance with contract terms, including “keeping itself available 24/7.” GSA is said to have taken full advantage of Marut’s services and availability. The rationale then continues:

However, the government breached the contract by failing to pay for the work Marut Testing performed. Thus Marut Testing incurred costs to perform the above-referenced contract but has been damaged by not recovering those costs. Marut Testing shows its cost incurred to perform by year on the following pages.

Appeal File, GSBCA 16487, Exhibit 6 at 2; Appeal File, GSBCA 16490, Exhibit 35 at 2; Appeal File; GSBCA 16491, Exhibit 2 at 2. At hearing Mr. Marut was asked what specifically in the contract supported his contention that, under the contract terms, his company was required to keep itself available “24/7.” In reply, Mr. Marut pointed to the fact that the contract ran for 365 days and that the contract’s Inspection of Services-Fixed-Price clause required it. Transcript at 1494-95; *see* Finding 17.

72. Shortly after the submission of the three REAs, the Board convened a conference with counsel to discuss Marut’s answer to discovery filed on April 21 and the REAs filed shortly thereafter. During that conference, government counsel expressed frustration with the information provided by Marut thus far concerning individuals who allegedly directed appellant either orally or in writing to incur costs to Marut’s detriment. Counsel suggested that information regarding specific incidents and individuals would be best obtained from appellant’s president, Mr. Marut, by deposition. There was general agreement among counsel and the Board on this suggestion. Counsel and the Board also concluded that, even though GSA had not yet ruled on the recently filed REAs, there would be merit in broadening the scope of any deposition Mr. Marut might give to include matters pertaining to these claims as well. Any information gleaned during the deposition regarding these claims might also prove useful to the contracting officers in rendering a decision on these new claims. Board’s Conference Memorandum, GSBCA 16079 & 16132 (June 22, 2004). The deposition was taken on July 15, 2004. Appeal File, GSBCA 16487, Exhibit 14.

73. Pending the deposition of Mr. Marut and the decision of the GSA contracting officers on the three pending REAs, further development of the record for GSBCA 16079 and GSBCA 16132 was stayed by the Board. Conference Memorandum (June 22, 2004).

shortly after the expiration of Contract 14. The work order that was issued, however, was subsequently canceled. *See* Finding 93.

GSBCA 16132Marut's Claims

74. This case appears to have its origin in a payment request dated December 13, 2000, prepared by Marut and seeking a payment under Contract 12 similar to those sought under Contract 13 and Contract 14. Findings 44, 48. This payment request is also based upon the contract's Minimum/Maximum Contract and Order Limitation clause. It calls for payment of 10% of the total evaluated bid price for the base year and all four option years less amounts already paid to Marut for work done pursuant to orders placed during the base year. The total requested is \$121,539.57. Appeal File, GSBCA 16132, Exhibit 44 at 3.

75. There is no indication in the record of any immediate action taken on the payment request of December 13, 2000. Instead, documentation in the record shows that approximately a year later, Mr. Marut was attempting to get the contracting officer to pay at least what he referred to as an "uncontested" amount which the contracting officer was apparently willing to pay to Marut based upon the contract's minimum ordering requirement. Using 10% of the total evaluated bid price for each of the three years the contract was in effect, the contracting officer calculated that, for the base year and the second option year, the Government had failed to order the minimum requirement. The contracting officer acknowledged that \$5859.57 was due for the base year and \$21,632.33 for the second option year. Although not in agreement with the contracting officer's interpretation of the contract's Minimum/Maximum Contract and Order Limitation clause, Marut, nevertheless, presented invoices for payment of these "uncontested" amounts. Appeal File, GSBCA 16132, Exhibits 46, 58, 61.

76. In the absence of a release of all claims, GSA refused to pay Marut's invoices for the "uncontested" amounts. Appeal File, GSBCA 16132, Exhibits 63-67, 69-70. Marut contended instead that any contractual requirement for release applied only to final payments. Because the payments sought were not final, Marut argued that there was no requirement for a release in this case. Appeal File, GSBCA 16132, Exhibits 70-71. Eventually, on May 6, 2002, GSA relented and approved a payment of \$27,491.90 (\$5859.57 + \$21,632.33) to Marut. *Id.*, Exhibits 72, 85 at 3.

77. On October 9, 2002, following the Board's decision in GSBCA 15412, Marut submitted to the contracting officer a certified claim with a request for a contracting officer's decision. The claim covered the base year of contract performance under Contract 12. The claim was based on 10% of the total evaluated bid price for the base year and all four option years less: (1) amounts already said to have been paid to Marut for work done pursuant to orders placed during the base year and (2) the payment earlier in the year of the

“uncontested” \$5859.57 (Finding 76). The total sought in this base year claim amounted to \$115,677 plus interest. Appeal File, GSBCA 16132, Exhibit 80.

78. A second certified claim and request for a contracting officer’s decision was submitted to the contracting officer on October 10, 2002. This claim covered the second year of contract performance under Contract 12. Like the preceding claim, it was based on 10% of the total evaluated bid price for the base year and all four option years less amounts said to have been paid already to Marut for work done pursuant to orders placed during that year. The total sought in this second year, or first option year claim, amounted to \$93,885.49. Appeal File, GSBCA 16132, Exhibit 79.

79. A third certified claim and request for a contracting officer’s final decision was submitted to the contracting officer on October 11, 2002. This third claim covered the third year of contract performance under Contract 12. The claim was based on 10% of the total evaluated bid price for the base year and all four option years less: (1) amounts already said to have been paid to Marut for work done pursuant to orders placed during the third year and (2) the payment earlier in the year of the “uncontested” \$21,632.33 (Finding 76). The total sought in this third year, or second option year claim, amounted to \$115,677 plus interest. Appeal File, GSBCA 16132, Exhibit 81 at 8.

The Contracting Officer’s Decision

80. On February 5, 2003, the contracting officer rendered a final decision regarding Marut’s claims submitted in October of the previous year under Contract 12. The claims were rejected because they sought amounts in excess of what the contracting officer found to be due to Marut. Specifically, the contracting officer noted that Contract 12, like Contract 13 (which was the subject of GSBCA 15412), is clearly an indefinite quantity contract with a Minimum/Maximum Contract and Order Limitation clause identical to that in Contract 13. Under this provision, there is a minimum guarantee of 10% of the total evaluated price for each year of contract performance. Appeal File, GSBCA 16132, Exhibit 85.

81. The contracting officer went on to note that, for Contract 12, Marut had submitted a proposal in which it offered for the base year and each option year the same amount, namely, \$289,192.50. The 10% guarantee in the Minimum/Maximum Contract and Order Limitation clause, therefore, according to the contracting officer, should be based on that figure and not on the total evaluated offered price for all five years of contract performance. Appeal File, GSBCA 16132, Exhibit 85.

82. Looking at the first year of contract performance (the base year), the contracting officer determined that GSA had placed and paid for orders in the amount of \$23,059.68. This left a shortfall of \$5859.57 when compared to \$28,919.25, the minimum guarantee for

that year (10% of \$289,192.50). For the second year of contract performance (first option year), the contracting officer determined that GSA had placed and paid for orders amounting to \$50,710.86, a figure well in excess of \$28,919.25, the minimum guarantee for that year. For the third year of contract performance (second option year), the contracting officer determined that GSA had placed and paid for orders in the amount of \$7282.85. This left a shortfall of \$21,636.40 when compared to \$28,919.25, the minimum guarantee for that year. Appeal File, GSBCA 16132, Exhibit 85.

83. Citing the Board's decision in GSBCA 15412, the contracting officer concluded that Marut was entitled to no more than a lost profit of 11% on the shortfall in orders for the base year and the third year of contract performance. The prior payment on May 6, 2002, of the entire amount of the shortfall was acknowledged by the contracting officer to be an erroneous overpayment. Appeal File, GSBCA 16132, Exhibit 85.

Marut's Revision of Its Claims

84. Following receipt of the contracting officer's decision, Marut submitted in late February 2003 three revised claims. Each claim was entitled "Claim For Firm-Fixed Price," was certified, and requested a contracting officer's decision. Each claim is described in seven pages of densely worded text not readily understandable. Each claim is for the entire evaluated amount of Marut's total offered price for each of the three years of contract performance. Because this total evaluated price was the same for each of the three years, the amount of each claim is the same, namely, \$289,192.50. Appeal File, GSBCA 16132, Exhibits 86-88.

85. Each of these three claims expressly states that the contracting officer did not make changes within the general scope of the contract in the services to be performed. Each claim also states, among many other things, that the contracting officer did not reduce the firm fixed price of \$289,192.50 and, in executing this contract, the contracting officer agreed to pay Marut \$289,192.50 as consideration for each year of the contract. Appeal File, GSBCA 16132, Exhibits 87-88.

Marut's Appeal

86. In early May 2003, Marut filed three notices of appeal regarding the contracting officer's decision of February 5. Finding 80. These three notices, like the revised claims filed in late February, are densely worded and difficult to understand. The claims said to be in dispute in these notices of appeal relate to the three years of contract performance. For each of the base year and the first two option years, the claim is said to be \$289,192.50 (i.e.,

20% of the total evaluated bid price of \$1,445,962.50 for standard services called for under the contract) plus a monthly fee of \$12,049.69 for special services and a similar monthly fee of \$12,049.69 for shop drawing and submittal review and drafting services. Appeal File, GSBCA 16132, Exhibits 89-91.

87. On June 13, 2003, Marut filed a thirteen-page complaint. Like its claims, this pleading is difficult to comprehend. In it, GSA is accused of breaching its contract with Marut by refusing to honor its agreement to pay Marut for “performing/maintaining” the contract for CIS support services “24/7 for the 365 days of each CIS one-year term contract was in effect.” Complaint at 8. During this same period, GSA filed its appeal file, which Marut supplemented with its own submission. In mid-July 2003, GSA filed its answer to Marut’s complaint. A few weeks earlier, however, the Government had filed a motion for summary relief in GSBCA 16079 and later filed a motion to dismiss. Findings 55-56. Because GSBCA 16079 and GSBCA 16132 involved nearly identical issues, little more was done to develop the record for GSBCA 16132, pending the completion of briefing and the Board’s decision on the two motions filed in GSBCA 16079.

88. Following the Board’s decision on the Government’s two motions in GSBCA 16079, GSBCA 16132 was transferred to the same panel responsible for resolving GSBCA 16079. Finding 67. The Board did not consolidate the cases at the time but advised counsel that it would develop the record for these two cases in tandem. Conference Memorandum (Mar. 1, 2004). As already indicated in the findings relating to GSBCA 16079, work on these two cases proceeded until the filing of Marut’s three REAs in early June 2004 when, except for the deposition of Mr. Marut, the Board stayed proceedings in both cases until the contracting officers could render decisions regarding these three new claims. Findings 67-73.

GSBCA 16487

Marut’s First REA Claim

89. The first of Marut’s three REAs was filed on June 4. It concerned Contract 14. As mentioned earlier, the rationale for each of the REAs filed was that Marut had fully performed this contract as well as Contracts 12 and 13. Marut contended that it had performed according to the contract terms, including keeping itself available twenty-four hours a day, seven days a week. The Government, however, allegedly had breached the contract by not paying for the work performed. In submitting these REAs, Marut sought, therefore, to recover the costs incurred in performing this work for which it had not been compensated and in holding itself in a constant state of readiness to perform any other work which GSA might call for under the contract. Finding 71.

90. The REA regarding Contract 14 came to a total of \$501,758. For the base year of contract performance, Marut allocated to Contract 14 a total cost of \$130,349.⁸ To this, Marut added a profit of 11%, or \$14,338. From the total of \$144,687, Marut deducted \$39,977 for payments received. The remaining figure of \$104,710 is said to be the net equitable adjustment due for the base year of Contract 14. Appeal File, GSBCA 16487, Exhibit 6 at 4.

91. For the first option year of contract performance, Marut allocated to Contract 14 a total cost of \$110,934. To this Marut added a profit of 11%, or \$12,203. Since there were no payments received during this period, Finding 51, the resulting total of \$123,137 is said to be the net equitable adjustment due for the first option year of Contract 14. Appeal File, GSBCA 16487, Exhibit 6 at 5.

92. For the second option year of contract performance, Marut allocated to Contract 14 a total cost of \$110,822. To this, Marut added a profit of 11%, or \$12,191. Since there were no payments received during this period, Finding 51, the resulting total of \$123,013 is said to be the net equitable adjustment due for the second option year of Contract 14. Appeal File, GSBCA 16487, Exhibit 6 at 6.

93. Although Marut admits that GSA never exercised the option for a third option year of contract performance, it still sought to include a claim for this additional year based on a COR's telephone call for performance in late August 1996 -- after the expiration of Contract 14. Appeal File, GSBCA 16487, Exhibit 6 at 7. The record does contain a memorandum to Mr. Marut from a COR named Chris Braham. The memorandum refers to an earlier telephone conversation between the two men regarding a project at three Social Security offices in Northern New Jersey to bring them into handicap access compliance. Consolidated Appeal File Supplement, Vol. 5, Exhibit 711. Also included in the record is a preconstruction conference agenda for the project sent to Mr. Marut by Mr. Braham with

⁸ The allocation percentages used throughout Marut's REA claim for Contract 14 as well as its REA claims for Contracts 12 and 13 (which are the subjects of GSBCA 16490 and 16491) are based upon the relation or percentage of the total evaluated price for a year of contract performance of the contract in question compared to the sum of the total evaluated prices for all of Marut's GSA contracts in effect for the same period. Since the contract years do not completely coincide, the allocation percentage varies sometimes between quarters of a given year when not all three contracts are in operation. However, when, for example, all three contracts were in effect, as occurred during option year one, the respective allocation percentages were 38.3% (Contract 12 with a total evaluated price of \$289,193 for that year), 41.1% (Contract 13 with a total evaluated price of \$310,232 for that year) and 20.6% (Contract 14 with a total evaluated price of \$155,331 for that year).

a note on page one dated August 28, 1996, which reads: “Joe, Here are the minutes/pre-con agenda for your use as discussed today.” *Id.*, Exhibit 713. In his testimony, Mr. Marut referred to this incident as an example of projects of which Marut was aware but which never went any further. Mr. Marut explained:

Chris Braham, for example, in '96 he sent us the minutes of a pre-construction conference and stuff like that, that we didn't have to attend, but we got the drawings and the specifications, and set up the files in option year 3.

. . . .

We set up the files and never received any other further direction on that.

Transcript at 310.⁹

94. For this third option year of contract performance, Marut allocated to Contract 14 a total cost of \$135,944. To this Marut added a profit of 11%, or \$14,954. Since there were no payments received during this period, the resulting total of \$150,898 is said to be the net equitable adjustment due for this third option year of Contract 14. Appeal File, GSBCA 16487, Exhibit 6 at 7.

The Operating Costs Included in Marut’s REAs

95. Each of the equitable adjustments Marut sought in June 2004 for an alleged four years of performance of Contract 14 is supported by a cost summary spreadsheet. Since this data is heavily relied upon by Marut in support of its REA claims, we set it out here in its entirety. It reads as follows.

Marut Testing & Inspection Services Inc.	1993	1994	1995	1996
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⁹ When Mr. Braham was called to testify, he recalled this project. It was his recollection that a work order was in fact issued to Marut. Nevertheless, he subsequently canceled it after concluding that he had no need of a CIS contractor and could do the inspections himself. He stated that he did not check to see if Marut’s contract was still in effect at the time he issued the work order. Mr. Braham also stated that he had no recollection of ever being advised by Marut that some work had been done under the work order before it was canceled. Neither did he recall ever receiving a request for payment for any such work. Transcript at 1133, 1137-40.

	Costs	Costs	Costs	Costs
Business Expenses				
Business Insurance Expense	\$47,540	\$21,566	\$24,942	\$31,255
Professional Services	\$5,740	\$7,703	\$7,055	\$6,825
Vehicle Costs	\$5,997	\$5,398	\$5,680	\$5,187
Office				
Postage/shipping	\$1,218	\$430	\$623	\$582
Office Supplies, Forms, and Reference Materials Library	\$2,157	\$3,515	\$1,698	\$1,455
Advertising	\$1,759	\$5,828	\$3,130	\$2,980
Charitable Donations	\$1,253	\$3,329	\$2,152	\$475
Building Expenses				
Utilities and Taxes	\$18,497	\$20,154	\$19,861	\$17,208
Building Rental (\$17.50/sq-ft per yr.)	\$175,000	\$175,000	\$175,000	\$175,000
Equipment Costs	\$240,000	\$240,000	\$240,000	\$240,000

Flat Rental \$20,000 per month				
Equipment Upkeep (Maintenance)	\$42,830	\$18,604	\$8,567	\$8,400
Additional Cash Loans	\$2,164	\$32,172	\$56,650	\$42,258
Total (Actual Annual Costs)	\$544,155	\$532,699	\$545,358	\$531,624

Appeal File, GSBCA 16487, Exhibit 6 at 9.

96. Appellant’s president, Mr. Marut, testified that he prepared this spreadsheet of costs. Transcript at 1273, 1275. It was pointed out to Mr. Marut on cross-examination that the annual costs listed on the spreadsheet for 1993 and 1996 are full-year values although Marut’s contracts were not in effect for the entirety of either of those years. The witness explained that the costs actually sought in the REAs are adjusted for that fact. *Id.* at 1274, 1300.

97. Mr. Marut was asked if the annual costs set out in his spreadsheet represented all of the costs incurred by Marut in order to function for each year in question. He replied that payroll costs were not included “[b]ecause they were included in as part of my claim.” Transcript at 1274-75.

98. Mr. Marut also explained that the annual costs listed in the summary spreadsheet had not been included in his calculation of the hourly rates listed in his contracts for inspectors. They represent only costs incurred by Marut at its home office in Penndel, Pennsylvania. Although assuring the Board that he separated costs incurred at Penndel from those incurred for inspectors in the field, Mr. Marut was unable to provide the Board with any documentation in support of this contention. Transcript at 1277, 1288.

99. Mr. Marut’s explanation for why he could not provide documentation to confirm his practice of segregating home office from field expenses or to confirm the various entries in his cost spreadsheet was that most of this documentation was either lost, damaged, or destroyed in 1998 when the building in Penndel, where the company’s home office was located, collapsed and was flooded following a severe snowstorm. Transcript at 205-06, 1277-79, 1288.

100. Government counsel questioned the accuracy of Mr. Marut's explanation in view of statements which Mr. Marut had made in a deposition taken of him in the summer of 2004. During that deposition, Mr. Marut was questioned about his preparation of this same summary spreadsheet of annual costs. In reply, he had testified at that time:

I checked my old records, my old invoices, my old lease arrangements, basically trial balances, any kind of agreements that I had, any kind of records that I have on maintaining the equipment, heat, gas, electric utility bills, that type of thing.

Transcript at 1278. When confronted with this prior testimony, the witness explained that the review he had described during his deposition was limited to undamaged records. *Id.* at 1279.

101. At the hearing for these appeals, government counsel pressed Mr. Marut on precisely what he had used to prepare this summary cost spreadsheet. Mr. Marut testified that trial balance sheets had still existed and that he had used these to come up with the summary costs. When asked what these balance sheets are, the witness simply replied: "That's how you track your costs, you know, for different things." Transcript at 1279. When asked if he has submitted these balance sheets in support of his claim, Mr. Marut replied that he was not asked to do so by GSA and he thought it sufficient to provide totals of the figures set out on the trial balance sheets. *Id.* at 1279-80.

102. Government counsel further questioned Mr. Marut regarding the individual entries in the summary cost spreadsheet. Turning first to "Business Expenses," counsel asked the witness how he had determined the specific cost of business insurance. Mr. Marut explained:

I had a record, you know, that had these costs in my files for the end of the year. It was all crappy and torn up and wet and everything else and I transposed that information to this sheet, which is allowable, you know, you are allowed to use electronic records and stuff like that. These are what I had, you know, this is just -- these are the records that I had. It's just that simple.

Transcript at 1281. Other than this documentation, which is not in the record, Mr. Marut could point only to a certification in his proposal, that he did have business insurance, as evidence that he incurred this expense. He readily admitted, however, that this certification does not indicate the cost of the insurance for any of the years that his contracts were in effect. *Id.* at 1282.

103. With regard to the heading of “Professional Services,” Mr. Marut testified that this included primarily the services of his accountant and perhaps occasionally an attorney. He admitted, however, that he had no documentation to support the entries under this heading other than “notes and stuff like that . . . in my files.” Transcript at 1284.

104. For documentation in support of the costs listed under the heading of “Vehicle Costs,” Mr. Marut testified:

When I prepared this summation sheet, I did prepare it using other documents that were, you know, but they were all jumbled together, they only made sense to me, you know. They didn’t make sense to anybody else, you know, it’s just that simple, you know, it’s just, you know, so I had to decipher all these things, you know, and put them together and that’s what it is, you know.

Transcript at 1284.

105. On the matter of annual costs listed under “Office Postage and Shipping,” Mr. Marut reluctantly admitted under questioning from both government counsel and the Board that he did not have documentation in support of these costs but observed that his allegedly copious correspondence with GSA “didn’t get there for free.” Transcript at 1286.

106. With regard to annual costs claimed under the heading of “Office Supplies, Forms, and Reference Materials Library,” Mr. Marut was unable to provide any documentation in support of the sums claimed. He noted simply that these were services which he had stated in his proposal that he would provide. Transcript at 1287-88.

107. Aside from the difficulty in documenting any specific cost claimed under the heading of “Advertising,” Mr. Marut provided no reasonable explanation of how this cost related to performance of his GSA contracts. Transcript at 1291.

108. On costs claimed under the heading of “Charitable Donations,” Mr. Marut admitted that this was not a cost he would expect to recover under a Government contract. Transcript at 1276.

109. Under the category of “Building Expenses,” Mr. Marut was asked if he had any documentary support to costs claimed under the heading of “Utilities and Taxes.” He replied that he had only a county tax receipt showing that property taxes were paid on the building where the company home office was located. Transcript at 1292, 1294. The receipt referred to by Mr. Marut shows only that no taxes remain due on a specifically numbered parcel for 1995 and 1996. The amount of taxes paid on this parcel is not indicated anywhere on the receipt. Consolidated Appeal File Supplement, Vol. 18, Exhibit 1000 at 3

(unnumbered). It is also unclear from the testimony of Mr. Marut whether the taxes on this property would even be a legitimate expense of appellant since the premises were leased to the company and, according to the testimony of Mr. Marut, taxes were paid by the company as part of the building rental. Transcript at 1293.

110. As to documentation in support of the claimed costs of utilities, Mr. Marut justified the absence of any such documentation on the ground that it was never sought by GSA. Transcript at 1294.

111. When questioned regarding the claim of building rental at a rate of \$17.50 per square foot, Mr. Marut assured the Board that the rate in his lease was comparable to similar leases of space in the area. The lease itself, however, has not been provided for the record in these cases. Transcript at 1297.

112. Under the category of "Equipment Costs," Mr. Marut was asked to explain the flat rate of \$20,000 per month. In reply, he referred government counsel to Marut's proposal for Contract 14. Transcript at 1298. The reference in question is described in Marut's proposal as a "partial list of various testing and inspection items owned by Marut Testing & Inspection Services, Inc." Appeal File, GSBCA 16079, Exhibit 27 at 62. Notwithstanding the assertion that the twenty-four items listed are "owned by Marut Testing & Inspection Services, Inc.," Mr. Marut explained that this statement was incorrect. He, in fact, is the owner of the equipment which, rather than being owned by his company, is rented to the company and under its control. When asked if he had any records regarding the original cost or value of the equipment, Mr. Marut replied that he did have records but they are now "all gone." He also stated that the rates he charged the company for rental of this equipment were less than those set out in a price list for rental of the same equipment published by the United States Army Corps of Engineers. The Corps' price list was not offered for the record. Transcript at 1298-99.

113. Mr. Marut testified that the documentation supporting the costs listed under the heading of "Equipment Upkeep and Maintenance" no longer exists. "They were all damaged and flooded and thrown out by people, you know, that were helping me, kind of clean up." Mr. Marut claims instead that the information contained in the current spreadsheet comes from summaries he made from the supporting documentation before it was destroyed. Transcript at 1301-02.

114. With regard to the costs listed under the heading of "Additional Cash Loans," Mr. Marut testified that this was money he gave to his company as a loan "to try to keep it afloat and stay in business hoping to get paid by the GSA." Transcript at 1302. He testified that this had involved such actions as cashing in insurance policies and withdrawing funds from individual retirement accounts. He explained that some of these transactions had been

documented but that this documentation had been destroyed with his other records when the roof of the company's office collapsed. Mr. Marut also stated that some documentation was in the possession of his accountant but that the accountant was now over eighty years of age and had hired a service to shred his files. *Id.* at 1303-05.

The Contracting Officer's Decision Regarding Marut's First REA

115. Following Mr. Marut's deposition on July 15, 2004, Finding 72, the contracting officer to whom Marut's REA on Contract 14 had been submitted, rendered a final decision denying the claim. Appeal File, GSBCA 16487, Exhibit 15.

116. The decision was issued on August 25, 2004. In it, the contracting officer denied any responsibility on the part of GSA for costs incurred by Marut in maintaining its business. He explained that the contract in question was clearly an indefinite quantity contract for one year with a provision to extend the term of the contract for up to four consecutive years and that only two one-year options were ever exercised. Inclusion of alleged damages regarding a third option year, therefore, was clearly erroneous. As to the three years in which the contract was in effect, the contracting officer concluded that Marut had provided no documentation to support its claim for damages due to the Government's alleged breaches of the contract. In addition, because the REA related to incidents which occurred over six years before the claim was filed, the contracting officer stated that the claim was barred by the statute of limitations. Appeal File, GSBCA 16487, Exhibit 15.

Marut's Appeal

117. By letter dated September 1, 2004, counsel for Marut filed a notice appealing the contracting officer's decision. In his notice, counsel contended that Marut was entitled to payment of \$501,758 in view of the Government's failure to issue work orders for work performed by Marut. Counsel argued that, in failing to issue these orders, the Government thus precluded payment to Marut for the services it actually rendered. Appeal File, GSBCA 16487, Exhibit 16. This appeal was docketed by the Board as GSBCA 16487.

GSBCA 16490

Marut's Second REA Claim

118. The second of Marut's three REAs was submitted on June 5, 2004. It concerned Contract 13 and came to a total of \$748,964.¹⁰ For the base year of contract performance, Marut allocated to Contract 13 a total cost of \$238,384. To this, Marut added a profit of 11%, or \$26,222. From the total of \$264,606, Marut deducted \$7779 for payments received. The remaining figure of \$256,825¹¹ is said to be the net equitable adjustment due for the base year of Contract 13. Appeal File, GSBCA 16490, Exhibit 35 at 4.

119. For the first option year of contract performance, Marut allocated to Contract 13 a total cost of \$241,540. To this Marut added a profit of 11% or \$26,570. From the total of \$268,110, Marut deducted \$42,663 for payments received. The remaining figure of \$225,447 is said to be the net equitable adjustment due for the first option year of Contract 13. Appeal File, GSBCA 16490, Exhibit 35 at 5.

120. For the second option year of contract performance, Marut allocated to Contract 13 a total cost of \$272,072. To this, Marut added a profit of 11%, or \$29,927. Since there were no payments received during this period, the resulting total of \$301,999 is said to be the net equitable adjustment due for the second option year of Contract 13. Appeal File, GSBCA 16490, Exhibit 35 at 6.

121. The costs allocated to Marut's REA for Contract 13 are derived from the same cost summary spreadsheet as provided in support of the REA for Contract 14 and are allocated to Contract 13 using the same methodology as used for Contract 14. Appeal File, GSBCA 16490, Exhibit 35 at 8; *see* Findings 90, 95-114.

The Contracting Officer's Decision Regarding Marut's Second REA

122. Following Mr. Marut's deposition on July 15, 2004, Finding 72, the contracting officer to whom Marut's REA on Contract 13 had been submitted, rendered a final decision denying the claim. Appeal File, GSBCA 16490, Exhibit 38.

¹⁰ This figure is \$35,309 less than the total of the net equitable adjustments claimed by Marut as due for the three years of contract performance of Contract 13. The reason for this reduction in the overall net REA for Contract 13 is that Marut credited GSA for payment made in 2001, ostensibly to make Marut whole for GSA's breach of the contract's Minimum/Maximum Contract and Order Limitation clause. Appeal File, GSBCA 16490, Exhibit 35 at 3; *see* Finding 44.

¹¹ Marut's claim is slightly incorrect. Using the method followed by the claimant, we calculate the net equitable adjustment to be \$256,827 rather than \$256,825.

123. The decision was issued on August 31, 2004. In it, the contracting officer contended that Marut had been paid for all work performed under delivery orders issued by GSA pursuant to the contract and that there had been no breach of the contract by GSA. The evidence provided by Marut in support of its claim that it performed additional work beyond that called for in the delivery orders was dismissed as inadequate to support such a claim. In addition, this contracting officer, like the contracting officer who rejected Marut's REA for Contract 14, Finding 116, also believed the claim barred by the statute of limitations since it related to incidents that allegedly occurred over six years before the claim was filed. Appeal File, GSBCA 16490, Exhibit 38.

Marut's Appeal

124. By letter dated September 7, 2004, counsel for Marut filed a notice appealing the contracting officer's decision. In his notice, counsel contended that Marut was entitled to payment of \$748,964 in view of the Government's failure to issue work orders for work performed by Marut. Counsel argued that, in failing to issue these orders, the Government thus precluded payment to Marut for the services it actually rendered. Appeal File, GSBCA 16490, Exhibit 39. This appeal was docketed by the Board as GSBCA 16490.

GSBCA 16491

Marut's Third REA Claim

125. The third of Marut's three REAs was submitted on June 4, 2004. It concerned Contract 12 and came to a total of \$676,160.¹² For the base year of contract performance,

¹² This figure is \$27,462 less than the total of the net equitable adjustment claimed by Marut as due for the three years of contract performance of Contract 12. The reason for this reduction in the overall net REA for Contract 12 is similar to that given for the reduction in the overall net REA claimed for Contract 13. In calculating this third REA, Marut credited GSA for payment made in 2002, ostensibly to make Marut whole for GSA's breach of the contract's Minimum/Maximum Contract and Order Limitation clause. Appeal File, GSBCA 16491, Exhibit 2 at 3; *see* Finding 76.

Marut allocated to Contract 12 a total cost of \$259,691. To this, Marut added a profit of 11%, or \$28,566. From the total of \$288,257, Marut deducted \$23,060 for payments received. The remaining figure of \$265,197 is said to be the net equitable adjustment due for the base year of Contract 12. Appeal File, GSBCA 16491, Exhibit 2 at 4.

126. For the first option year of contract performance, Marut allocated to Contract 12 a total cost of \$223,948. To this, Marut added a profit of 11%, or \$24,634. From the total of \$248,582, Marut deducted \$50,711 for payments received. The remaining figure of \$197,871 is said to be the net equitable adjustment due for the first option year of Contract 12. Appeal File, GSBCA 16491, Exhibit 2 at 5.

127. For the second option year of contract performance, Marut allocated to Contract 12 a total cost of \$223,304. To this, Marut added a profit of 11%, or \$24,563. From the total of \$247,867, Marut deducted \$7283 for payments received. The remaining figure of \$240,584 is said to be the net equitable adjustment due for the second option year of Contract 12. Appeal File, GSBCA 16491, Exhibit 2 at 6.

128. The costs allocated to Marut's REA for Contract 12 are derived from the same cost summary spreadsheet as provided in support of the REA for Contracts 14 and 13, and are allocated to Contract 12 using the same methodology as used for Contracts 14 and 13. Appeal File, GSBCA 16491, Exhibit 2 at 8; *see* Findings 90, 95-114, 121.

The Contracting Officer's Decision Regarding Marut's Third REA

129. Following Mr. Marut's deposition on July 15, 2004, Finding 72, the contracting officer to whom Marut's REA on Contract 12 had been submitted, rendered a final decision denying the claim. Appeal File, GSBCA 16491, Exhibit 7.

130. The decision is undated, but a certified mail receipt in the record shows that it was received by appellant on September 7, 2004. In her decision, the contracting officer wrote that the REA was essentially the same as the claim for breach previously denied on February 5, which ultimately became the subject of GSBCA 16132. *See* Findings 80-83. She, therefore, repeated much of what she had already stated in her earlier decision. She acknowledged that the Government did breach the contract's Minimum/Maximum Contract and Order Limitation clause but admitted no other breach. She then explained once more how GSA calculated the amount said to be due the contractor as a result of the admitted breach. Appeal File, GSBCA 16491, Exhibit 7.

Marut's Appeal

131. By letter dated September 7, 2004, counsel for Marut filed a notice appealing the contracting officer's decision. In his notice, counsel contended that Marut was entitled to payment of \$676,159 in view of the Government's failure to issue work orders for work performed by Marut. Counsel argued that, in failing to issue these orders, the Government thus precluded payment to Marut for the services it actually rendered. Appeal File, GSBCA 16491, Exhibit 8. This appeal was docketed by the Board as GSBCA 16491.

III. Findings Regarding Subsequent Processing of the Five Appeals

Consolidation

132. At a status conference with counsel for the parties convened on December 16, 2004, the Board agreed, at the request of both counsel, to consolidate all of Marut's appeals for purpose of hearing and decision. The week of April 11, 2005, was selected for the hearing on these cases. Board's Conference Memorandum (Dec. 16, 2004).

Supplementation of the Record

133. At a status conference convened on March 10, 2005, counsel for appellant reported that his client had only recently discovered a large quantity of materials which might be useful in proving Marut's claim. Counsel explained that his client had already delivered five cartons of material to his law office and now was suggesting that there were perhaps as many as ten file cabinets of documentation in Penndel which might contain documentation relevant to Marut's claim. These developments obviously put in question the feasibility of a hearing beginning April 11. Counsel for appellant advised the Board that he planned to travel to Penndel shortly to examine the materials said to be in storage there. The Board, therefore, scheduled another status conference for March 17 to hear a report from counsel regarding his visit to Penndel. In the meantime, at the request of government counsel, the Board established July 1, 2005, as the absolute deadline for any further supplementation of the appeal files by appellant. Board's Conference Memorandum (Mar. 10, 2005).

134. On March 17, counsel for Marut reported to the Board and opposing counsel on the outcome of his visit to Penndel. He expressed the opinion that some of the material in storage there would be relevant to the five appeals and that his client would submit supplements to the current appeal files for these five appeals. The Board insisted that a reasonable amount of time be provided for government counsel to review the proposed supplements and to engage in discovery if this was deemed necessary. Board's Conference Memorandum (Mar. 17, 2005).

Hearing

135. After additional status conferences with counsel for the parties in which the Board established a schedule for discovery and heard reports regarding appellant's and respondent's proposed supplements to the appeal files for these cases, the Board issued a notice of hearing. Tuesday, October 18, 2005, was set as the new hearing date for these appeals. Notice of Hearing (Oct. 2, 2005). The hearing took place at the United States District Court in Newark, New Jersey. It adjourned temporarily on Friday, October 21, and reconvened at the Board's offices in Washington, D.C. on Wednesday, October 26. The hearing concluded on Friday, October 28.

Discussion

GSBCA 16079 and 16132

We turn first to Marut's two appeals regarding the denial of its claims for breach of the contract's Minimum/Maximum Contract and Order Limitation clause. Finding 12 (Clause VI). In our decision granting in part GSA's motion for summary relief in GSBCA 16079, we upheld the contracting officer's interpretation of that clause based upon our previous decision in GSBCA 15412. Findings 44-47, 59. Appellant, however, contends that the Government has misinterpreted these decisions. Counsel writes:

One of the reasons for these appeals is because the government insists on a misreading of this Board's holding in GSBCA 15412 and made explicitly clear in this Board's October 6, 2003, order . . . as well as [in] the Federal Circuit's clear decision on which these decisions are based. That is, Marut Testing is entitled to recovery of its costs pursuant to the minimum guarantee if it shows it actually incurred the costs, that the costs were reasonable under the circumstances and related to the contract.

Appellant's Posthearing Brief at 31.

It is true that in GSBCA 15412 we concluded that Marut was entitled to recover as damages under the contract's Minimum/Maximum Contract and Order Limitation clause only a lost profit of 10%. Finding 47. It is also true that the contracting officers in both GSBCA 16079 and GSBCA 16132 limited Marut's recovery for breach of the same clause, to lost profit only. Findings 51, 83. This, however, did not mean that Marut could not recover other than lost profit for breach of that clause. The recovery under Contract 13 in GSBCA 15412 was limited to lost profit only in the absence of proof of other damages. Finding 47. Similarly, the relief offered by the contracting officers to Marut for an admitted breach of the Minimum/Maximum Contract and Order Limitation clause in Contracts 12 and

14 was likewise correctly limited to lost profit simply because Marut had failed to address that issue in its claims.

In ruling on the Government's motion for summary relief in GSBCA 16079, we concluded that one reason why Marut failed to adduce evidence regarding costs incurred as a consequence of the Government's breach of the contract's Minimum/Maximum Contract and Order Limitation clause was Marut's fundamental misunderstanding of the methodology set out in the clause for calculating the contract's guaranteed minimum. Accordingly, once we had rejected in its entirety the methodology used by Marut to calculate the quantum of its claim of breach under the clause, we thought it only fair to permit appellant to support its breach claim with evidence of damages flowing from the Government's admitted breach. *Marut Testing*, 03-2 BCA at 160,276. In mid-October 2003, we, therefore, invited appellant to submit evidence of costs in support of its claim both under GSBCA 16079 and GSBCA 16132. Findings 62-67.

The evidence eventually provided by Marut, in late April 2004, in response to this opportunity offered, was less than responsive. Rather than focus on the breach claims which are the subject of GSBCA 16079 and GSBCA 16132, Marut provided summary data of costs incurred under all three of its CIS contracts with GSA. The data was broken out by year but not by contract. According to Marut, it would be easier to break the material out by contract at a later date when its claim would be audited. Findings 68-69. It was also explained to us, at the time this summary data regarding costs was provided, that the submission was also intended to support claims of "greater breaches" to be filed by Marut in the near future. Finding 70.

When, in ruling on the Government's motion for summary relief in GSBCA 16079, we decided to offer Marut the opportunity to provide evidence of damages suffered as a result of the Government's breach of the contract's Minimum/Maximum Contract and Order Limitation clause, we frankly realized that this evidence might prove troublesome. We noted that any cost claimed would have to be actual, reasonable under the circumstances, and related to the contract. Among other issues, we observed that the reasonableness of paying standby costs over a prolonged period of time in the absence of any work order could be of particular significance. *Marut Testing*, 03-2 BCA at 160,276.

The costs which Marut has provided in support of the two breach claims we are discussing here, as well as in support of its company's three REAs, raise all of these issues and more. First and foremost, there is the question of how these costs should be allocated to Contracts 12, 13, and 14. Then there is the very serious problem presented by the dearth of documentation in support of the alleged costs. Findings 99-107, 109-14. Without this documentation and evidence of a concerted effort to mitigate damages, it is of course difficult to assess the reasonableness of the claimed costs. With regard to some costs, such

as charitable donations and advertising, it is difficult to see how they would even relate to the contracts which are the subject of the two appeals discussed here (Contracts 12 and 14). Findings 107-08.

In addition, from what we now know of Marut's operations, there are other issues which arise regarding these costs. For example, Mr. Marut has assured us that he separated costs incurred at Penndel from those incurred for inspectors in the field. Yet, he was unable to provide us with documentation in support of this alleged practice. Findings 98-99. In addition, we now have the somewhat contradictory testimony from him that at least a small portion of the home office G&A expenses was included in the hourly rates charged under the contract. Finding 39. This poses the quandary of whether some of the costs claimed by Marut have not been already recovered partially through the payment of invoices for the services of these inspectors.

Another issue raised by Marut's claimed costs which remains unresolved is the apparent absence of any payroll costs from this summary of costs. We are left with only the cryptic explanation from Mr. Marut that personnel costs are not included in this summary of costs "because they were included in as part of my claim." Finding 97.

An additional problem inherent in the summary costs provided by Marut concerns the costs said to be associated with work done on a federal building in Albany, New York, in the summer months of 1993, prior to award of Contract 13 on October 28. Finding 38. Appellant points out to us that this work was ordered from Marut by GSA after the expiration of Marut's predecessor contracts with GSA and prior to the award of Contract 13, which covered the upstate New York area. Appellant's Posthearing Brief at 14; Finding 6. Mr. Marut, however, has testified that the costs associated with this project are part of his current claim. Transcript at 1403. Since the services were rendered prior to the award of Contract 13, they obviously cannot be part of this litigation, which deals only with disputes arising in relation to Contracts 12, 13, and 14.¹³ A similar problem may exist with regard to costs associated with work done by Marut in 1996 after the expiration of Contract 14. These costs cannot be part of this litigation any more than can be costs said to have been incurred prior to contract award. Nevertheless, Mr. Marut states that he set up a file on a project to render certain Social Security offices handicap-access compliant but that nothing more was heard

¹³ To justify the inclusion of these costs in the present claim, Mr. Marut testified that the work was called for under either Contract 14, which was awarded on June 30, 1993, or Contract 12, which was awarded on July 12 of the same year. Transcript at 1382. Neither contract was the proper vehicle for ordering the work in question. Contract 14 applied to construction projects only in metropolitan New York City and Contract 14 applied to projects only in the state of New Jersey. Findings 4-5.

from GSA. Presumably, the limited costs incurred by Marut in preparing for this project were included in Marut's summary of costs for 1996. *See* Finding 93.

Whatever the various problems may be with Marut's summary of claimed costs, there is still the lingering question of whether we can attribute any weight at all to the evidence he has provided -- both oral and documentary -- regarding these costs. Mr. Marut does have a penchant for exaggeration, as is readily seen, for example, in his assurance that his summary spreadsheet of costs could be supported by "invoices, checks, individual breakdowns of costs and other evidence," though he has produced no such evidence. Findings 69, 100. This same characteristic is likewise conspicuous in some of his interpretations of contract provisions, such as the contract's Inspection of Services-Fixed Price clause. The clause does nothing more than provide that the Government will have the right to inspect and test all services called for under the contract "to the extent practicable at all times and places during the term of the contract." Finding 17. Nevertheless, Mr. Marut insists that this provision required his company to keep itself in a constant state of readiness on a twenty-four-hour, seven-days-a-week basis. Findings 71, 87, 89. We also must acknowledge that Mr. Marut's testimony is, perforce, as counsel for GSA hastens to remind us, self-serving. In addition, as government counsel also reminds us, Mr. Marut has provided very little support, other than his word, for the fact that, during the winter of 1998, his company's home office suffered devastating damage from a snowstorm.

On balance, however, we are not prepared to say that Mr. Marut, as appellant's principal witness, is totally lacking in credibility. In observing Mr. Marut through seven days of hearing, we are left with the impression that this is an individual unlikely to deceive directly, but subject, on occasion, to a degree of self-deception. We are prepared to accept this witness's word regarding the state of his records at Penndel. Indeed, his counsel has visited the site and had occasion to discuss this problem with opposing counsel and the Board. Finding 134. From the evidence produced in this case, and, in particular, from Mr. Marut's lengthy testimony, we are convinced that he played an intensely personal and vital role in his company and is extremely knowledgeable regarding its operations. We have no reason to doubt his continuous and basic claim that, in the absence of a required minimum of work orders under his contracts, his company suffered damages in the form of lost profits and unrecovered operating costs. The question, however, is how much of what was lost can his company recover.

Although Marut did not initially break out its operating costs by contract, it did allocate these costs to Contracts 12, 13, and 14 in preparing its REA submissions. Findings

69, 90-92, 94, 118-20, 125-27.¹⁴ We have compared the amounts available under the contract in the event of breach of the minimum ordering requirement with the costs allocated by Marut to the contracts for the periods in which Contracts 14 and 12 either were not used at all or were underutilized by GSA. In the case of Contract 14, Marut would recover under the clause an amount which would cover less than 13% of the costs allocated to the contract for the periods in question.¹⁵ For Contract 12, the amount received would cover less than 12%.¹⁶ As we have already noted, we have serious reservations regarding the reliability of

¹⁴ In calculating its REAs under Contracts 12, 13, and 14, Marut has used a formula for allocation of costs to the individual contracts which we consider to be reasonable. *See* Finding 90 & n.6. It has followed the same method for all three REA claims. Findings 121, 128. We also have the assurance of Mr. Marut that the figures used for purposes of the allocation are not identical to the full-year costs set out in his summary cost sheet but rather have been adjusted to account for partial years when the contracts began and ended. Finding 96.

¹⁵ For Contract 14, the costs allocated by Marut to the first and second option years, during which the Government placed and paid for no orders, are \$110,934 (first option year) and \$110,822 (second option year), respectively. Findings 91-92. The amount of relief available under the contract's Minimum/Maximum Contract and Order Limitation clause would be no more than \$15,533.05 per year. Finding 51. When one deducts a lost profit of 10% from this guaranteed minimum, the resulting \$13,979.75 is all that remains to cover the contractor's claimed costs for the period in question. For the first option year, this represents no more than 12.60% of the cost allocated to that period of the contract ($\$13,979.75/\$110,934$), and for the second option year, it represents no more than 12.61% of the cost allocated to that period ($\$13,979.75/\$110,822$).

¹⁶ With regard to Contract 12, GSA did not meet the guaranteed minimum in the base year or in the second option year (year three of the contract). During the base year, GSA fell short of the guaranteed minimum by \$5859.57 or 20.26% of the guaranteed minimum of \$28,919.25. In the second option year, the shortfall of the guaranteed minimum was \$21,636.40 or 74.81% of the guaranteed minimum of \$28,919.25. Finding 82. The costs which Marut allocated to the base year and the second option year of Contract 12 were \$259,691 (base year) and \$223,304 (second option year), respectively. Findings 125, 127. We must, of course, make a proportional adjustment of these allocated costs to reflect payments actually made to Marut during these two years of underutilization. The allocated costs for the base year of \$259,691 are reduced to \$52,613.40 (20.26% X \$259,691) and the allocated costs for the second option year of \$223,304 are reduced to \$167,053.72 (74.81% X \$223,304). From the amount available for relief for the base year, \$5859.57, we subtract 10% for lost profit (\$5859.57 - \$585.96). This leaves only \$5273.61 to cover costs actually incurred during the base year. When compared to the adjusted allocated costs for this same

the evidence provided by Marut in support of its claimed costs taken as a whole. Nevertheless, we are persuaded that the amounts which Marut would recover for breach of the contract's Minimum/Maximum Contract and Order Limitation clause are so minuscule, when compared to the costs allocated to the various periods in question, as to justify a conclusion on our part that these amounts obviously fall short of what Marut would reasonably be expected to actually pay to sustain operations during these periods of inactivity or underutilization relative to his CIS contacts. We, therefore, find that, for both Contract 14 and Contract 12, Marut is entitled to the maximum relief available under the contract's Minimum/Maximum Contract and Order Limitation clause.¹⁷

This conclusion on our part does not mean that we are granting these two appeals of Marut in their entirety. We agree with the contracting officers that Marut is claiming far more than that to which it is entitled under the Minimum/Maximum Contract and Order Limitation clause. As we have already done in our decision granting summary relief in part under GSBCA 16079, we likewise affirm the contracting officers' interpretation of this clause. *See Findings 50-51, 80-82.* It is only Marut's right to a very limited relief beyond lost profit that we now uphold.

As we noted in our decision granting partial summary relief in GSBCA 16079, we do not view Marut's claim for this relief under the Minimum/Maximum Contract and Order Limitation clause as a claim for costs as such. *Marut Testing*, 03-2 BCA at 160,273, 160,276. Rather, under the clause, the relief is for a sum certain which should contribute toward defraying standby costs incurred during a period of inactivity or underutilization when income from the contract is either non-existent or below the guaranteed minimum. Of course, if those costs should be less than the amount available for relief under the clause,

period, the amount available covers only 10.02% of the costs Marut claims to have expended during this period for which it received no compensation (\$5273.61/\$52,613.40). From the amount available for relief for the second option year, \$21,636.40, we subtract 10% for lost profit (\$21,636.40 - \$2163.64). This leaves only \$19,472.76 to cover costs actually incurred during the second option year. When compared to the adjusted allocated costs for this same period, the amount available covers only 11.66% of the costs Marut claims to have expended during this period for which it has received no compensation (\$19,472.76/\$167,053.72).

¹⁷ One might ask why, in view of what at least is a very limited confidence in the evidence provided by Marut regarding its costs on Contracts 12, 13, and 14, we don't also award similar relief to Marut under the Minimum/Maximum Contract and Order Limitation clause in Contract 13. Our reason for not doing so is obvious. The time to present evidence on such a claim for Contract 13 expired with the closing of the record in GSBCA 15412. The Board's decision in that case has long since become final.

then the contractor would be damaged only to a limited extent and would have no right to the remaining balance of otherwise available relief.

Knowing what we now know of Marut's operations and its alleged operational costs, we are persuaded that, in Marut's case, the limited relief afforded under the Minimum/Maximum Contract and Order Limitation clause will clearly defray only a minuscule portion of the company's claimed costs. Accordingly, notwithstanding the inherent deficiencies in the bulk of the evidence presented by Marut in support of its operational costs and notwithstanding the apparent absence of any effort on the part of Marut to mitigate damages, we are nonetheless now persuaded that during periods of inactivity or underutilization, the company did incur standby costs at least equal to the limited relief available as a result of GSA's failure to meet the minimum ordering requirement of Contract 12 and Contract 14. For this reason we are satisfied that the company is entitled to the relief afforded under the clause and that, in receiving this relief, Marut will in no way be in a better position than it would have been in if GSA had not breached this requirement of the contracts. *White v. Delta*, 285 F.3d at 1043; Finding 46.

For GSBCA 16079, the relief amounts to \$15,533.05 for the second year of contract performance (10% of \$155,330.50, the total evaluated bid price for that year) and an additional \$15,533.05 for the third year of contract performance (10% of \$155,330.50, the total evaluated bid price for that year as well), for a total of \$31,066.10.

In our decision regarding Marut's claim for payment under Contract 13, we concluded that the claimant was entitled to no more than \$4262.63 of the \$35,309.04 already received from GSA for its admitted breach of the contract's Minimum/Maximum Contract and Order Limitation clause. *Marut Testing*, 02-2 BCA at 157,823. This resulted in an overpayment of \$31,046.41, which has not been formally claimed by GSA and remains unpaid to the present. Since our decision in GSBCA 15412 on Marut's claim under Contract 13 is now final, we see no reason why that amount we found to have been overpaid should not be setoff against our award here of \$31,066.10, thus leaving a balance of \$19.69 still due.¹⁸

¹⁸ One issue touched on briefly during the hearing for these cases and in Appellant's Posthearing Brief at 26 is the contracting officer's actual calculation of the \$35,309.04 paid to Marut under Contract 13. In calculating the amount believed due to Marut, the contracting officer did not subtract from 10% of the total evaluated offer price for each year the total amounts actually paid on work orders issued during that year, but rather, subtracted the total amount of orders issued -- even when they were partially canceled when it was determined that no further services were needed. The total orders issued were \$7317.30 in excess of the total actually paid to Marut. Appeal File, GSBCA 16490, Exhibit 29. Had the contracting officer based her calculation on the amount actually paid to Marut under the orders issued,

So far as interest is concerned on Marut's claim under GSBCA 16079, we find that the claimant is entitled to interest calculated in accordance with the Contract Disputes Act on the amount awarded, \$31,066.10, from the date on which Marut's original claim was received by the contracting officer until December 29, 2000, the date on which GSA paid Marut the \$35,309.04 believed to be due under Contract 13. *Marut Testing*, 02-2 BCA at 157,819. Interest on the remaining balance of \$19.69 is due from December 29, 2000, until paid.

For GSBCA 16132, the contracting officer's decision of February 5, 2003, concluded that, in view of a shortfall in ordering during the base year of Contract 12, Marut was due a payment of \$5859.57 and, owing to a shortfall in ordering in the third year of the contract, Marut was due an additional \$21,636.40. The total found due to Marut at that time, therefore, was \$27,495.97. Finding 82. Prior to that determination, however, the contracting officer had already concluded that Marut was entitled to payment of a total \$27,491.90 for the Government's failure to order the minimums required during the base year and the third year of Contract 12. This amount was paid to Marut on May 6, 2002. Finding 76. The increase of \$4.07 over the original payment is undoubtedly due to a slight adjustment upward in the figures used by the contracting officer to make the final calculation of the amount due. Accordingly, we find that appellant is due interest on \$27,495.97 from the date of Marut's original claim, Finding 74, until May 6, 2002, when Marut was paid \$27,491.90. As to the difference of \$4.07, interest is due on that amount from May 6, 2002, until paid.

Before leaving our discussion of GSBCA 16079, there is the matter of the three work orders issued to Marut during the second year of Contract 14. The orders called for the services of an electrical inspector at three specific sites where work was to be done at offices of the Social Security Administration. The orders were provided for the record by Marut. Appeal File, GSBCA 16079, Exhibit 30. The record also contains cancellations of these

of course, the amount found due would have been greater than that paid. We did not examine or comment on this issue in GSBCA 15412 since the primary focus in that case was on whether the calculation should be based upon 125% of the grand total evaluated offer price for all five years of the contract or upon 10% of the total evaluated offer price for each year. As we concluded in GSBCA 15412, the calculation should be based upon 10% of the total evaluated offer price for the year in which the Government failed to order the required minimum. That minimum should, obviously, be based upon the amount actually paid for orders since the Government can hardly take credit under the Minimum/Maximum Contract and Order Limitation clause for those portions of a work order subsequently canceled. In GSBCA 16079 and GSBCA 16132, this issue does not even arise since both contracting officers correctly based their calculations upon amounts actually paid under issued work orders. Findings 50, 82.

orders. *Id.*, Exhibit 32. Marut contended that it performed work pursuant to the orders before they were canceled, but was never compensated for this work. Finding 61. At hearing, Mr. Marut testified that the work in question for which the company was not compensated was of a preparatory nature and was done at Penndel, not at the sites. He further admitted that no electrical inspector was even sent to the sites and, thus, any claim for the value of the preliminary work done would be part of the costs he is claiming in his REAs for work done outside of a work order. Transcript at 1315-22.

In view of Mr. Marut's explanation, we conclude that this part of appellant's claim under GSBCA 16079 has been abandoned and reasserted instead as part of Marut's REA claim for Contract 14 in GSBCA 16487.

GSBCA 16487, 16490, and 16491

We come next to a discussion of Marut's REAs for Contracts 12, 13, and 14. As a threshold matter, we note that two of the three contracting officers reviewing Marut's REAs were of the opinion that these were new claims barred by the statute of limitations. Findings 116, 123. On the other hand, the contracting officer for Contract 12 saw the REA as nothing but a reformulation of an earlier claim of Marut. Findings 80-83, 130.

We believe that, of the three contracting officers, the one assigned to Contract 12 is closest to being correct. During the course of Marut's litigation, a bewildering multitude of breach claims have been presented, revised, resubmitted, amplified, and explained in complex pleadings by Mr. Marut, as he continued to represent his company in a *pro se* capacity. Findings 48-49, 53-54, 74, 77-79, 84-87. Amid all these contentions of breach, we are relatively certain that the essential elements of the three REAs filed in June 2004 were previously brought, in one form or another, to the attention of the contracting officers assigned to Marut's three contracts. It was only after Mr. Marut had the wisdom to retain competent, professional counsel that these earlier breach claims were somehow refashioned into an REA format. In any event, the operative facts behind the earlier claims and the REAs are basically the same, thus rendering any distinction between them notional at best. *Santa Fe Engineers, Inc. v. United States*, 818 F.2d 856, 858 (Fed. Cir. 1987); *Parcel 49C Limited Partnership v. General Services Administration*, GSBCA 16377, 05-2 BCA ¶ 33,098, at 164,069; *Whiting-Turner/A. L. Johnson Joint Venture v. General Services Administration*, GSBCA 15401, 02-1 BCA ¶ 31,708, at 156,622-23 (2001).

In providing a rationale for its three REAs, Marut contends: "[T]he government breached the contract by failing to pay for the work Marut Testing performed. Thus Marut Testing incurred costs to perform the above-referenced contract but has been damaged by not recovering those costs." Finding 71. Given the record before us, we cannot agree that the

Government has breached the contract by failing to pay for work performed. Rather, what we find is a fundamental and critical misunderstanding, on the part of Marut, of the contractual scheme underlying all three contracts.

There are three elements of paramount importance to this contractual scheme: (1) the contract's scope of work, (2) the method of ordering and paying for services rendered under the contract, and (3) the hourly rate to be charged under the contract for the services of inspectors. We turn first to the scope of work. Three categories of services are envisioned. Finding 13. The first category of services is "Standard Services." This, by far, is the most elaborate part of the scope of work. Even the most cursory review of the lengthy listing of standard services reveals that much more than mere construction inspection is expected of the contractor here. Many of the responsibilities described are tantamount to contract management tasks.¹⁹ See Finding 14.

The description in the scope of work of the second category of services, "Special Services," is considerably shorter than the description of standard services. The same can be said of the third category of services, "Shop Drawing-Review and Submittal Review and Drafting Services." What is of particular importance with regard to these two last categories of services is that payment under the contract for these services -- whether provided in-house by the contractor itself or by an outside subcontractor retained by the contractor -- is pursuant to fees negotiated between the parties after award.²⁰ Findings 15-16.

So far as ordering and paying for services under the contract are concerned, the contract provides that no services shall be performed under the contract until a written work order is issued by the contracting officer reflecting the total number of hours to be worked

¹⁹ In observing that GSA, in addition to inspection services, also required Marut to perform contract management services, appellant appears to suggest that inclusion of the management services in a CIS contract is less than appropriate. Appellant's Posthearing Brief at 17. Whatever the merits of this position as a theoretical proposition, given the presence of such tasks in the contract scope of work, which Marut accepted without objection, we find no merit in the observation as respects this litigation.

²⁰ In our earlier decision granting, in part, GSA's motion for summary relief in GSBCA 16079, we incorrectly stated that the contractor's charges for *all* services within the CIS's in-house capabilities were paid pursuant to work orders based on fixed hourly rates. *Marut Testing*, 03-2 BCA at 160,274. While this is correct with regard to standard services, it is incorrect with regard to special services. Under the contract, special services, whether performed by the contractor or by an outside subcontractor, are always paid for pursuant to a fee negotiated by the parties after award. Finding 15.

by the inspector(s) identified in the work order, who, in turn, will be paid at the applicable rate(s). Finding 12 (Clause V). The contract likewise provides that the CIS will be paid for actual hours worked by the staff, in accordance with the Work Order. *Id.* (Clause IX). Indeed, the very first of the standard services listed in the contract's scope of work reads: "Perform all Standard Services covered in the contract as specified in each Work Order issued by the Contracting Officer." Finding 14.

In the absence of any fee negotiated after award for special services or for shop drawing and submittal review and drafting,²¹ therefore, the *only* price terms in the CIS contract are the hourly rates for inspectors in each of the six disciplines identified in the solicitation, namely, General Construction Inspector, Mechanical Inspector, Electrical Inspector, Structural Inspector, Asbestos Abatement Inspector, and Elevator Inspector. Finding 9. These are the *only* prices proposed by an offeror. Furthermore, it is solely on the basis of these offered hourly rates, extended out for each discipline and multiplied by the Government's estimated number of hours such an inspector will be needed for each year, that a total evaluated bid price is calculated for each year; and it is only on the basis of these total evaluated bid prices for the base year and option years that offers are evaluated. Findings 9-10.

Once award is made, therefore, the contractor's fixed hourly rates for inspectors are the only prices in the contract. In other words, whatever standard service the Government may call for under the contract, the contractor will not be paid or compensated for rendering that service *except by charging one of the fixed hourly rates for an inspector.*

This brings us to the third critical element in the contractual scheme, the fixed hourly rates in the contract for the services of any one of the six possible types of inspector. The contract, with good reason, provides that this hourly rate shall be fully burdened. It reads: "The hourly rates for all disciplines listed elsewhere in this contract shall include all attributable costs; overhead, profit, travel, shipping and postal charges[,] all office supplies, office and telephone equipment[,] and charges for telephone calls." Findings 8, 12 (Clause IX), 33. The need to include all of these costs in the inspectors' rates should be self-evident. Unless provision is made in the inspector's hourly rate for the costs associated with the provision of standard services either by the inspector or by another working in support of the inspector, that cost will simply never be recovered under the contract.

²¹ Mr. Marut cannot recall any work orders being issued for either special services or shop drawing or submittal review during the life of his contracts. Finding 40. We assume, therefore, that no special rates were negotiated for these two type of services.

Obvious as this fact should have been, it is now clear from the testimony of Mr. Marut that he either did not realize the fact or chose to ignore it. He explains that he carefully separated costs associated with his inspectors in the field from those relating to work done by himself and his colleagues at the home office in Pennel. With the exception of a small unspecified portion of the home office G&A expenses, Mr. Marut now tells us that home office costs were not included in the calculation of the hourly rates established under the contract for his inspectors. He goes so far as to assure us that these hourly rates were “substantially discounted.” Mr. Marut elected not to hire inspectors capable of performing most of the standard services described in the contract’s scope of work or in the preconstruction conference agendas, which tracked with the scope of work, but, rather, reserved most of those tasks to the home office. Findings 21-22, 24-26, 39, 98.

Undoubtedly, Mr. Marut’s failure to appreciate the critical role played by the hourly rates for inspectors in Contracts 12, 13, and 14, can be traced in large part, if not entirely, to his mistaken understanding of how these fixed price contracts operated. From the start, he apparently failed to perceive that the “fixed price” aspect of his company’s contracts with GSA lay in the fixed hourly rates set out in the contract for the services of inspectors and not in the Total Evaluated Offer Price shown on his proposals’ offer sheets and subsequently in the contracts themselves. *See* Finding 9. Mr. Marut testified that, during the time of contract performance and, presumably, prior to contract award as well, he believed that, because he had a firm fixed price contract, he would receive, during the course of each year of contract performance, the total estimated value of the contract for that year -- regardless of whether any services were ordered by GSA during that year. Finding 41. Obviously, with that mistaken understanding of the basic contractual scheme, he failed to perceive the critical importance of the hourly rates for inspectors that ultimately became fixed in his contracts.

Having abandoned the notion that his company is entitled to a fixed price payment over the course of each contract year, Mr. Marut now contends that the company is entitled to a global work order through which it can be compensated for services rendered outside of contract work orders.²² Finding 42.

In our decision regarding the Government’s motion for summary judgment in GSBCA 16079, we expressly rejected Mr. Marut’s mistaken understanding of how his fixed price contract was to work. Finding 58. We concluded that there was no reasonable basis for such

²² Counsel for appellant states in his posthearing brief that, for contracts preceding Contracts 12, 13, and 14, GSA did issue a global work order to pay Marut for contract management services performed. Appellant’s Posthearing Brief at 23. The statement is without citations to the record. Furthermore, it is our understanding that, at hearing, Mr. Marut eventually admitted that no such global work order was issued. Finding 43.

an interpretation under the contract when read as a whole. We arrive at a similar conclusion regarding his contention now that his company is entitled to be compensated for services rendered outside of work orders issued under the contract. Such an interpretation turns the contractual scheme on its head. As already noted, under the contract, the Government can call for a wide variety of standard services. The services are called for through work orders issued under the contract. The orders call for the services of inspectors from any one of six different disciplines. For each inspector, there is a fixed hourly rate and the hourly rate agreed to is to contain all direct and indirect costs associated with the services provided by the inspector or by others working in support of the inspector. Findings 9-12. If the Government were to accede to Marut's present request to issue a work order covering all those services allegedly rendered outside of work orders, the Government would itself be ignoring these provisions.

In short, we find the provisions of Marut's contracts with GSA regarding the scope of work, the method of ordering and paying for services, and the purpose and composition of the hourly rate for inspectors to be clear and unambiguous. The mere fact that appellant does not agree with GSA's interpretation and application of these provisions hardly serves to render them ambiguous. Contracts are not necessarily rendered ambiguous by the mere fact that the parties disagree regarding the meaning of their provisions. *Community Heating & Plumbing Co. v. Kelso*, 987 F.2d 1575, 1579 (Fed. Cir. 1993); *Brunswick Corp. v. United States*, 951 F.2d 334, 337 (Fed. Cir. 1991).

Marut, in proposing and agreeing to an unrealistic hourly rate for its inspectors, departed, in a radical fashion, from the contractual scheme. It now urges GSA to do the same. For good reason, GSA has declined to do so and, instead, has hewed to the original contractual scheme to which the parties originally agreed. In this regard, we find the testimony of Mr. Marut particularly telling when he ultimately conceded that he never invoiced GSA for the services allegedly not paid for "because GSA never issued me a work order to do that" Finding 37.

The REAs submitted in these three cases are premised on the contention that the Government somehow introduced a change into the requirements of Marut's contracts. We think not. Rather, the change was one introduced unilaterally by appellant and not one to which the Government agreed or unwittingly acquiesced. No work order was issued for these allegedly unpaid services because, if appellant had adhered to the fundamental scheme of its contracts and offered a realistic and representative hourly rate for his inspectors, no such work order would have been necessary.

Appellant points out that GSA did in fact know that many services provided under the contract were rendered by Marut out of its home office rather than by the inspector on site. For this reason, Marut argues, the Government should not now be permitted to escape

liability for the costs of these services. We find the argument unpersuasive. The picture painted by Mr. Marut of constant and intense involvement of the home office in the services provided by its inspectors in the field appears to us to be somewhat exaggerated. The highly credible testimony of one COR called by the Government stands out in marked contrast to Mr. Marut's general contentions. *Compare Findings 24-27 with Findings 28-31.*

More importantly, we are not aware that any of the various CORs and other GSA representatives working with Marut on different projects were privy to how Mr. Marut had constructed the hourly rates included in his company's proposals and eventually in the company's contracts. The Government makes a good argument that many, if not all, of the tasks performed by Marut at Penndel could and perhaps should have been done on site rather than at the home office. The need for reliable sign-in sheets as back-up for invoices certainly supports the Government's position on this issue. Findings 30-36. Nevertheless, we remain convinced that, in view of the wide variety of standard services enumerated in the scope of work, at least some of these tasks could have been done more efficiently at the home office by support staff. As the contracting officer for Contract 13 testified, however, the cost of such support should undoubtedly have been included in the inspector rates. Finding 33. The fact, therefore, that GSA employees witnessed tasks regarding a given project being done at the home office rather than by an inspector in the field was hardly a dead give-away that Marut had grossly underbid its hourly rates.

Finally, appellant contends that GSA employees with authority to contact Marut would contact the CIS contractor by phone, mail, fax, or otherwise, and order services consistent with specifications in all of the contracts. Marut contends that it would provide the service requested but not necessarily pursuant to a work order. Appellant's Posthearing Brief at 18. This is a contention made earlier in the proceedings and is one of the issues government counsel was particularly intent on pursuing in written discovery and in the deposition of Mr. Marut. Findings 66, 72. Appellant, however, provided scant evidence of requests being made in the total absence of a work order during the course of the contract. If such did occur, Marut was clearly proceeding at its own risk in view of the contract requirement that no work should be undertaken without the issuance first of a work order. Finding 12 (Clause V).

What Marut's evidence did show were repeated requests from GSA or construction contractors for services from support staff at Penndel in situations where a work order had been issued for an on-site inspector but Mr. Marut preferred to have the service provided by the home office rather than by the inspector on site. This, as we have already pointed out, was a problem of Marut's own making and stemmed from the fact that Mr. Marut appointed inspectors of limited competence and failed to provide in the inspector's hourly rate for the cost of having these services furnished off site by staff at Penndel. Findings 24-26, 39, 98.

Counsel for appellant contends: “GSA’s failure to pay for the work performed pursuant to its instructions as set forth in the contract represents a classic change to that contract.” Appellant’s Posthearing Brief at 32. We find no such failure to pay. Mr. Marut, himself, has assured us that, at this point, his company’s claim is for the cost of services for which it allegedly has not been paid and not for any amounts that might be due pursuant to any work order for the services of a field inspector. Finding 37. The contract provides that, in the absence of fees agreed to after award for special services or for shop drawing/submittal review and drafting services, payment will be made only pursuant to applicable hourly rates for inspectors as called for in officially issued work orders. If there is no controversy regarding amounts due under these work orders, then we find no breach of contract for failure to pay for work performed. The REAs, therefore, have been rightfully denied.

In closing, we note, in the alternative, that if we are incorrect in our analysis and there has been a breach as Marut contends, then its REAs still fail for want of proof regarding damages. In our discussion regarding GSBCA 16079 and GSBCA 16132 we have already had occasion to comment on major deficiencies besetting the evidence provided by Marut of costs said to have been incurred during the period of contract performance, for which the contractor alleges it was not paid. While we were disposed to recognize that a case could be made for the reliability of a very small percentage of these costs for purposes of granting Marut relief under the contract’s Minimum/Maximum Contract and Order Limitation clause, we are prepared to go no farther than that. Our assessment of that evidence, when taken as a whole, remains decidedly negative. *See* Findings 99-114. Even if Marut were to prevail, therefore, on the entitlement portion of its case for the three REAs, we would still deny the claims for want of adequate proof of costs.

Decision

Marut’s appeals under GSBCA 16079 and GSBCA 16132 are **GRANTED IN PART**. The appeals under GSBCA 16487, GSBCA 16490, and GSBCA 16491 are **DENIED**.

EDWIN B. NEILL
Board Judge

We concur:

STEPHEN M. DANIELS

ANTHONY S. BORWICK

GSBCA 16079, 16132, 16487, 16490, 16491

60

Board Judge

Board Judge