ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeals of --	)	
	)	
Supreme Foodservice GmbH	)	ASBCA Nos. 57884, 58666, 58958
	)	58959, 58982, 59038
	)	59164, 59165, 59391
	)	59392, 59393, 59418
	)	59419, 59420, 59481
	)	59615, 59618, 59619
	)	59636, 59653, 59675
	)	59676, 59681, 59682
	)	59683, 59811, 59830
	)	59863, 59867, 59872
	)	59879, 60017, 60024
	)	60250, 60309, 60365
Under Contract No. SPM300-05-D-3130	)	

APPEARANCES FOR THE APPELLANT:

Philip J. Davis, Esq.
Rand L. Allen, Esq.
Nicole J. Owren-Wiest, Esq.
John R. Prairie, Esq.
Tara L. Ward, Esq.
J. Ryan Frazee, Esq.
Wiley Rein LLP
Washington, DC

Farah Shah, Esq.
Associate Legal Counsel
Supreme Group[1]

APPEARANCES FOR THE GOVERNMENT:

Daniel K. Poling, Esq.
DLA Chief Trial Attorney
Kristin K. Bray, Esq.
John F. Basiak Jr., Esq.
Kari L. Scheck, Esq.
Corinne Foley Petersen, Esq.
Trial Attorneys

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[1] Ms. Shah appeared on behalf of appellant and Ms. Bray appeared on behalf of the government when the motions at issue were filed but they have since withdrawn their appearances.

OPINION BY ADMINISTRATIVE JUDGE SCOTT
ON THE GOVERNMENT'S MOTION FOR PARTIAL SUMMARY JUDGMENT
AND APPELLANT'S CROSS-MOTIONS TO DISMISS AND STRIKE, AND
FOR PARTIAL SUMMARY JUDGMENT

Supreme Foodservice GmbH (Supreme) has appealed under the Contract Disputes Act (CDA), 41 U.S.C. §§ 7101-7109, from the contracting officer's (CO's) denial or deemed denial of its claims for monies owed under the subject Subsistence Prime Vendor (SPV) contract for delivery of food and other products to the United States military and Defense Logistics Agency (DLA) customers in Afghanistan. It also has appealed from COs' decisions asserting claims against it, including, *inter alia*, on the alleged ground that actions of or attributable to Supreme rendered the contract void *ab initio*.

DLA moves for summary judgment on three of its affirmative defenses, which allege that Supreme fraudulently induced DLA by materially misrepresenting its pricing and relationships prior to contract award and during performance; it had unclean hands due to violation of conflict-of-interest restrictions by its personnel; and it committed the first material contract breach. DLA contends that summary judgment on any of these defenses requires dismissal of all of Supreme's appeals in which the contractor has asserted a claim, and that summary judgment on the fraud in the inducement or conflict-of-interest defenses would dictate that the contract is void *ab initio*.

Supreme moves to dismiss "with prejudice" all of DLA's claims that Supreme corrupted or tainted the SPV contract through fraudulent conduct or violations of criminal conflict-of-interest laws on the ground that the CO has no authority to assert such claims, the CO's decision is invalid, and the Board has no jurisdiction to adjudicate the claims (*see* app. mot. at 4, 18-19). Supreme also moves to strike DLA's related fraud in the inducement and conflict-of-interest affirmative defenses, which Supreme alleges are actually claims, and DLA's affirmative defense of first material breach (*id.* at 4, 19).

To the extent the Board does not dismiss DLA's claims/affirmative defenses for lack of jurisdiction, Supreme moves for summary judgment or, alternatively, that the Board dismiss with prejudice and strike DLA's claims/affirmative defenses that Supreme fraudulently induced DLA to enter into certain contract modifications by knowingly making false statements about costs and profit and misrepresentations about a related corporate entity; Supreme violated conflict-of-interest laws; and it committed the first material breach. Supreme contends that DLA's "claims" based upon false statements and misrepresentations and conflict of interest are barred by the CDA's statute of limitations; in a civil fraud settlement, the government expressly released its fraud in the inducement claim and defenses; DLA waived any right to void the contract by repeatedly reaffirming its validity despite DLA's knowledge of the alleged misconduct; and the doctrine of accord and satisfaction bars DLA from arguing that its contractual obligation to compensate Supreme for contract performance has been discharged. Supreme notes that its cross-motion does not encompass the CO's 9 December 2011 final decision, below,

which asserted a monetary claim against it for alleged overpayments by the government (app. opp'n, tab 1 at 1 n.2).

At Supreme's request, the Board, sitting as a panel, heard oral argument on the parties' motions on 27 May 2015.

STATEMENT OF FACTS (SOF) FOR PURPOSES OF THE MOTIONS

Unless otherwise noted, the following facts are undisputed or uncontroverted.

The Subsistence Prime Vendor Solicitation

1. On 3 September 2004 the Defense Supply Center Philadelphia (DSCP, now DLA Troop Support)[2] issued a solicitation for SPV support for award of multiple indefinite quantity contracts to food distributors acting as Prime Vendors (PV) responsible for supply and delivery of semi-perishable and perishable items to five zones. Zone 3 was Afghanistan. (R4, tab 1 at 1, 10)[3] The PV contractor was to deliver Local Market Ready (LMR) type items from approved sources and make largely land-based deliveries to four sites in Zone 3: Bagram, Salerno, Kandahar and Kabul.[4] Several drop points were expected for shipments to Bagram and Kandahar, which would also each have a central storage drop point. The solicitation stated regarding Zone 3: "Note, if additional land based customer locations are added to this region post award, the distribution fee per the contract award terms will apply." (R4, tab 1 at 70) The solicitation also stated that delivery to airfields and airports might be required. Host nation contractors were to make deliveries from the central storage drop points to U.S. military Forward Operating Bases (FOBs) in Afghanistan. The contractor was not responsible for distribution to the FOBs. (R4, tab 1 at 13, 70-71, tab 3 at 31) The solicitation stated that "[f]requently the [PV] will be required to execute airlifts to meet requirements that cannot be fulfilled by traditional means" and that "[t]he vendor will have to demonstrate new and creative ways to meet customer requirements, and the ability to airlift is one of those avenues" (R4, tab 1 at 18).

2. Pricing was to be based upon "Unit Price = Delivered Price + Fixed Distribution Price (or Fee)" (R4, tab 1 at 19). The "Unit Price" was "the total price...charged to [DLA] per unit for a product delivered to the Government." The "Delivered Price," also known as the "product price," was the "manufacturer/supplier's actual invoice price...to deliver product" to the contractor's distribution point in Afghanistan. (*Id.* at 19-20) The "Distribution Price" was defined as a "firm fixed price":

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[2] We generally refer to the various iterations as "DLA."

[3] We cite to the Rule 4 file in ASBCA Nos. 57884, 58666, unless otherwise indicated.

[4] LMR items are primarily perishable or short shelf-life goods purchased from suppliers outside the United States (gov't ex. 43, attach. B (Statement of Facts) at 1).

> [W]hich represents all elements of the unit price, other than the delivered price. The distribution price typically consists of the [PV's] projected general and administrative expenses, overhead, profit, packaging costs, transportation cost from the [PV's] OCONUS distribution facility(s) to the final delivery point or any other projected expenses associated with the distribution function. This distribution price is intended to reflect the difference between the delivered price and the unit price to deliver the specified product to the ordering activity. This distribution price shall represent the amount to be added to the actual invoice price paid to the manufacturer or supplier by the [PV] for each item.

(R4, tab 1 at 20)

3. The solicitation, incorporated into the contract (*see* R4, tab 5 at 2), contained, *inter alia*, the Federal Acquisition Regulation (FAR) 52.212-4, CONTRACT TERMS AND CONDITIONS—COMMERCIAL ITEMS (OCT 2003) clause (R4, tab 1 at 250); and the Defense Logistics Acquisition Directive (DLAD) 52.212-9000, CHANGES – MILITARY READINESS (MAR 2001) clause. The latter provided:

> The commercial changes clause at FAR 52.212-4(c) is applicable to this contract in lieu of the changes clause at FAR 52.243-1. However, in the event of a Contingency Operation..., the [CO] may, by written order, change—
>
> (1) the method of shipment or packing, and
> (2) the place of delivery.
>
> If any such change causes an increase in the cost of, or the time required for performance, the [CO] shall make an equitable adjustment in the contract price, the delivery schedule, or both, and shall modify the contract.

(R4, tab 1 at 264-65)

Joseph Alvarez

4. Joseph Alvarez is a former DLA employee and Army Major who worked for DLA Troop Support in Europe (Government's Statement of Undisputed Material Facts (GUF) ¶ 4; Appellant's Statement of Genuine Issues of Material Fact (AIF) ¶ 4). From 2002 through March 2004, he authored or was copied on several internal DLA emails concerning the provision of subsistence support in Afghanistan, some of which involved Supreme's potential capabilities in that area. Maryann DiMeo was DLA's CO primarily

responsible for acquisition planning, solicitation, and award of the SPV contract to Supreme (gov't ex. 7 (DiMeo 12/5/14 decl. ¶ 2)). She and/or Gary Shifton were copied on at least four of the emails (gov't exs. 8-13). Mr. Shifton was CO DiMeo's "first line supervisor" at DLA (Government's Statement of Genuine Issues of Material Fact (GIF) ¶ 13; *see* GUF ¶ 22). MAJ Alvarez was identified on his 8 May 2002 email as "Chief, Food Service Business Unit, [DSCP], European Region" (gov't ex. 8 at 1) and on his 7 November 2003 email as "Chief, Subsistence, DSCPE" (gov't ex. 10 at 1).

5. MAJ Alvarez met Stephen Orenstein, Supreme's principal owner, at a DLA-organized food show in October 2003 (GUF ¶ 5; AIF ¶ 5; app. ex. 5 (Orenstein dep.) at 46, app. ex. 7 at 2). MAJ Alvarez signed an employment agreement with Supreme on 5 March 2004 which provided that he would start on 1 April 2004 at the earliest and 1 June 2004 at the latest (app. ex. 1). According to Mr. Orenstein, Supreme had "failed to win past [PV] contracts" and he thought creating a position for Mr. Alvarez could improve its chances of being awarded future contracts (gov't ex. 2 (Orenstein dep.) at 58; GUF ¶ 7, AIF ¶ 7). Mr. Alvarez was able to provide Supreme with "a great deal of knowledge and depth in regard to U.S. government contracting, specifically SPV contracting that...Supreme did not have during the [proposal] phase" (gov't ex. 3, Michael J. Gans dep. (Gans dep.) at 45; GUF ¶ 8; AIF ¶ 8).

6. MAJ Alvarez's 23 March 2004 email from a Supreme address, "jalvarez@supreme-foodservice.com," to Mr. Orenstein and Michael J. Gans, one of Supreme's owners (Gans dep. at 9-10), stated:

> I told DSCP Gordon [Ferguson] and Gary [Shifton] about my future life with Supreme. Both were very positive about me getting the job in the food industry and in line with my personal wishes. I have also let the key folks on my team here know, as well. I am awaiting my new retirement orders so I can pick-up my clearing papers and get out. I will have 10 work days to clear and then I can go on my transition leave.

(Gov't ex. 14 at 1) MAJ Alvarez asked Messrs. Orenstein and Gans if there were "any changes to the last document that Toby [Switzer] sent out for review?" (gov't ex. 14 at 1). Mr. Switzer was identified as "General Manager, PWC [Public Warehousing Company] [PV]" (*id.* at 2; *see also* app. ex. 5 at 42).

7. Supreme was a subcontractor to PWC for subsistence services in Afghanistan prior to the SPV contract at issue (app. ex. 5 at 41). Mr. Orenstein testified in his deposition about the subcontract relationship as follows:

Q Had Supreme ever performed subcontracting services on a [SPV] contract prior to the Afghanistan [SPV] contract?

A Yes.

Q Which contract was that?

A That was PWC's Iraq contract, Kuwait contract, where we provided supply in Afghanistan in the months leading up to the [PV] contract.

Q How did Supreme come to be a subcontractor for PWC?

A Because Supreme had a relationship with PWC.

Q When did Supreme develop that relationship with PWC?

A I believe it was 2003 or 2004.

Q And how did that relationship become developed in 2003 or 2004?

A We were operating the food supply contract for the British Ministry of Defense in Iraq out of Kuwait alongside PWC, who was doing the supply to the U.S. forces in Iraq.

....

Q Can you tell me how Supreme became the subcontractor, how that relationship developed?

A Joe Alvarez had a relation – or knew people at PWC and developed a concept whereby we could support the U.S. government in Afghanistan with some of the logistics services under the PWC Kuwait, Iraq, contract.

(App. ex. 5 at 41-43)

8. MAJ Alvarez's 13 April 2004 email, from a DSCP-E [DSCP Europe] address, to DLA personnel, including CO DiMeo and Mr. Shifton, stated:

> Today, I reported to the US Army transition center in Wiesbaden to begin my official journey out of the Armed Forces of the United States of America.... If you need to reach me, my new contact information follows:
>
> jalvarez@supreme-foodservice.com....

(Gov't ex. 15)

9. A pre-solicitation notice for the SPV project issued on 14 July 2004. The acquisition planning materials are dated July and August 2004. (App. exs. 3, 4)

10. On 25 October 2004 PWC and Professional Contract Administrators (PCA) executed an agreement whereby Supreme Foodservice AG, predecessor to appellant Supreme Foodservice GmbH,[5] with the assistance of PWC/PCA, would submit a proposal in response to the solicitation. PWC/PCA was to provide food prices and supply chains for use in responding. If Supreme secured the SPV contract, it was to pay fees to PWC/PCA. *See Agility Public Warehousing Co. K.S.C. et al. v. Supreme Foodservice GmbH*, 840 F. Supp. 2d 703, 706 (SD N.Y. 2011), *aff'd*, 495 F. App'x 149 (2d Cir. 2012) (*Agility PWC*).

11. On 16 November 2004 Supreme submitted its proposal to DLA for SPV support in Zone 3. The proposal was signed by Joseph Alvarez, "Major, United States Army [Ret.]," as Supreme's "Director, U.S. DOD [Department of Defense] Division." (Gov't ex. 16; GIF ¶¶ 18, 20) The Quality Assurance, Supplier Selection Program portion of the proposal identified PWC and PCA as entities with which Supreme had entered into relationships in support of its proposed contract work. PWC was identified as the incumbent PV for Kuwait, Iraq and Qatar. (App. ex. 25 at 1-2)

12. Mr. Orenstein testified at his 4 December 2014 deposition that he had hired Mr. Alvarez (app. ex. 5 at 57-58), and that his role was:

> A So we at that time were a company that was providing food supply services to a number of customers in a number of countries. We had not been supplying the U.S. military, which was the largest potential customer for us. And we decided that we needed a person to focus on business development for the U.S. government, and that was the main objective for Joe.

(*Id.* at 60) Mr. Orenstein testified that Mr. Alvarez had "led the effort" regarding preparation of Supreme's proposal (*id.* at 51).

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[5] In general, we use "Supreme," regardless of name variants.

13. Mr. Gans testified at his 17 October 2014 deposition that Supreme hired Mr. Alvarez because:

> A We were preparing to bid on the mega solicitation, I think zone 3. If I'm not mistaken and Joe was hired to assist us with the preparation of that bid, among other things.
>
> Q And that's the SPV contract we're referring to?
>
> A Correct.

(App. ex. 6 at 50-51)

14. On 17 February 2005 Mr. Shifton sent an email to DLA personnel, including CO DiMeo, concerning a DLA meeting that Mr. Alvarez had attended, stating:

> Note, I just completed an on-line procurement integrity course and in gaining experience over the past few years, the matter of having Joe Alvarez at this meeting could indeed become very problematic.

(Gov't ex. 17 at 4) A DSCP-E employee responded that Mr. Alvarez had asked him about the meeting and if he could attend and, "[s]ince we didn't have any plans to discuss any issues or topics about the pending mega PV contracts awards, and nor did we, I told him he could stop in" (*id.* at 3-4). CO DiMeo's memorandum for the record dated 18 February 2005 stated:

> Joe Alvarez of Supreme Foodservices was in attendance at a meeting with DSCP-E and the 29th Support Group. Discussed was business as it is done today in Afghanistan. DSCP-Philadelphia did not find out about Mr. Alvarez's interest in attending until after the fact. According to Earl Milligan of DSCP-E, Mr. Alvarez received his consent to attend. Mr. Milligan stated that he saw no harm in this since only current business was discussed, which he believed all contractors are aware of, rather than anything pertaining to the new acquisition or future way ahead. Mr. Milligan further stated that Mr. Alvarez was silent throughout the meeting, did not take any notes, and did not pass out any business cards. Mr. Shifton instructed Mr. Milligan that were Philadelphia consulted we would have refused to allow Mr. Alvarez to participate, since he is employed by a commercial entity with which DSCP does not have privity of contract, especially in

> the environment of having an open acquisition for Afghanistan. See attached e-mail traffic which documents these events.

(*Id.* at 11)

15. It is undisputed that, after leading and signing Supreme's proposal on the SPV solicitation, Mr. Alvarez became involved in many of the most important and high-dollar aspects of the SPV contract modifications, negotiations, and performance, including signing Modification (Mod.) No. P00012 (Mod. 12) (below) (GUF ¶ 23; AIF ¶ 23).

Contract Award, Expanded Mission and Premium Outbound Transportation Pricing

16. Effective 3 June 2005 DSCP awarded the SPV contract to Supreme for Zone 3, Afghanistan (R4, tab 5 at 1). It was for a period of up to five years (18-month base period, two 12-month options, one 18-month option) and provided that Supreme's distribution prices were to remain the same for the option periods. The estimated value was $726,213,126 if all three options were exercised. (*Id.* at 3)

17. During what DLA has described as an initial, six-month, ramp-up period, Supreme provided support to various FOBs as a subcontractor to the incumbent SPV, PWC (*see* R4, tab 113 at 11 n.5; app. supp. R4, tabs 2, 3 at 1 (e.g., Alvarez emails); AIF ¶ 35; gov't resp. to Supreme 27 Aug. 2013 mot. for declaratory relief at 25, ¶ 11).

18. After contract award to Supreme, but prior to performance, which started in December 2005, DLA and Supreme understood that DLA's mission for the U.S. military was expanding beyond support for the original four sites in the solicitation. DLA asked Supreme to support additional customer locations throughout Afghanistan—the FOBs. (GUF ¶¶ 25-27; GIF ¶ 38; AIF ¶¶ 25-27; AUF ¶ 38) On 26 August 2005, the CO issued a "verbal change order" that Supreme provide distribution support directly to FOBs in Afghanistan by a combination of fixed-wing, rotary-wing and ground delivery. DLA agreed to pay it a premium fee for deliveries to these FOBs beyond the general area of the original sites. This FOB distribution support with premium fee became known as "Premium Outbound Transportation" or "POT." (*See* R4, tab 7 at 2; AUF ¶ 26; GIF ¶ 26; GUF ¶¶ 33, 34; AIF ¶¶ 33, 34)

19. On 20 December 2005 the CO asked Mr. Alvarez for the details of Supreme's pricing as soon as possible. She stated that she preferred one rate justified by the estimated percentage of anticipated orders for ground, fixed-wing and helicopter transport, which the parties could review and adjust the percentages and distribution fee based upon actuals. She would nonetheless accept separate fees for each delivery system if they could be determined to be fair and reasonable. (Gov't ex. 25 at 3-4)

20. On 25 December 2005 Supreme gave DLA a "cost methodology" in support of its proposed firm-fixed-price POT rates for fixed-wing and rotary-wing deliveries, but noted that it was "extremely difficult to predict" what the actual aircraft requirement would be and that flexibility was required to address customer needs. Supreme offered prices for fixed-wing and rotary-wing aircraft based upon average mission lengths and an assumption of pounds transported. (Gov't ex. 25 at 1-3; AUF ¶¶ 28-32; GIF ¶¶ 28-32).

21. On 16 February 2006 the CO advised Messrs. Alvarez, Orenstein and Michael Epp, identified as of 1 February 2007 as Supreme's "Director Supply Chain," (gov't ex. 30 at 1):

> I can at least assure you that the overall structure of your strategy is exactly what I was looking for you to do. As you've done, we needed you to apply your projected costs to service the FOBS across your anticipated volume and come up with a revised per lb. price. What you are doing in terms of looking at average weights within categories to apply this fee to each category is also the same approach that I would take, although I'm sure that some individual items will wind up skewed a bit based on this rationale, and we'll need to adjust at that level.... We will need to cross verify all numbers/quantities used etc. in order to make a determination as to reasonableness.
>
> Please make sure that the final offered distribution fees include all costs, including tri-walls since we want to be able to catalog actual final costs to the customers.... [A]ny lease agreements or contracts for planes, pilots, housing etc. that you've needed to place will help me in documenting your actual costs from an audit standpoint which will be necessary in order to attempt to justify these.
>
> ...[W]e [will] also be reviewing all catalogs for individual items which appear particularly high. Please take advantage of this opportunity to offer reductions on any items [which] you anticipate may cause us all heartburn later.

(App. supp. R4, tab 22 at 83-84)

22. Supreme provided more material on 15 March 2006 (gov't ex. 26). In a 1 June 2006 email Supreme asked the CO to approve submitted rates and a claimed amount of $22,575,064.95 as being fair and reasonable for FOB support services provided from contract commencement to date "so that we can move forward with the new distribution fee proposal" (app. supp. R4, tab 29 at 1). The email included a

certification in CDA format. Supreme increased its claimed amount to $33,502,365 on 12 July 2006, covering services through June 2006 (*id.*, tab 31 at 1). There was no CO's decision on this claim, which the parties appear to have treated for the most part as a request for equitable adjustment (REA) (*see* below and gov't ex. 43 (Guilty Plea Agreement, attach. B (Statement of Facts) at 2).

23. Supreme and DLA were unable to reach agreement on pricing for the POT mission and DLA ultimately requested assistance from the Defense Contract Audit Agency (DCAA) in assessing the fairness and reasonableness of Supreme's proposed POT rates (*see* GUF ¶ 60; AIF ¶ 60)

Modification No. P00010

24. Effective August 2006,[6] bilateral contract Mod. No. P00010 (Mod. 10) formalized the CO's August 2005 verbal change order for deliveries to additional sites throughout Afghanistan beyond the original four sites. It covered the period from the start of SPV contract performance in December 2005 through June 2006. (R4, tab 7; AUF ¶ 38; GIF ¶ 38) The modification stated that it was issued pursuant to the DLAD 52.212-9000 CHANGES-MILITARY READINESS clause (R4, tab 7 at 1). The modification's Statement of Work was as follows:

> A....
>
> 1. The 68 FOB sites which have been identified and provided to Supreme, are officially added as locations for delivery of all classes of items via the best possible means of delivery....
>
> 2. It is understood that the means of delivery is based upon discussions pertaining to the type of air strip available at the location and the feasibility of ground transportation due to both security issues and road conditions. It is also understood that operational security within Afghanistan, to include the impact of weather conditions, can change with little or no notice. Supreme is therefore authorized to change the mode of delivery based on operational security and weather conditions to any individual FOB with no advance notice and bill at the appropriate rate for the type of service provided, subject to subsequent audit. The goal set forth herein is always to use the least expensive mode of transportation available, maximizing over road transportation where this is

[6] The parties agree that, in signing the modification, Mr. Orenstein mistakenly wrote "2007" as the year (GUF ¶ 62 n.9; AIF ¶ 62 n.9).

physically realistic without unnecessarily jeopardizing either the life of Supreme personnel, or the condition of the product.

....

B. [Mod. 10] hereby formalizes the verbal change order issued on 26 August 2005...and subject to final verification, definitizes the agreement of pricing for deliveries made from 13 December 2005 through 30 June 2006. The proposed premium rates below for transportation to the FOBS are still being validated but are acceptable for the purposes of this equitable adjustment until verification is completed....

C. This modification begins the process for good faith reimbursement of the proposed $33.5 million equitable adjustment which Supreme has requested in compensation for services rendered from 13-December 2005 through 30-June 2006, as verification of the claim continues. The proposed payment schedule for these services is shown below...:

$12.5 million – 01 August 2006
$12.5 million – 01 September 2006
$8,502,365.00- To be determined based upon verification and approval of charges to date.

D. The vendor acknowledges that payment of $33.5M, upon verification, will satisfy in full all claims for the subject FOB support from 13 December 2005 through 30 June 2006. If this amount cannot be verified by DSCP, a subsequent modification will be required to fully discharge Supreme's claim.

....

F. All other terms and conditions remain unchanged.

(R4, tab 7 at 2-3) The "proposed premium rates" were: fixed wing transportation - $2.65 per pound; rotary wing transportation - $8.35 per pound; ground transportation to the FOBs - $0.48 per pound; $241 per chilled tri-wall; and $302 per frozen tri-wall[7] (*id.* at 3).

[7] DLA was to pay Supreme a set sum for the preparation and packing of each tri-wall (an insulated cardboard box) "which contained some of the perishable chilled or frozen goods ordered by the troops which were acquired outside of the United States" (gov't ex. 43, attach. B at 2).

Supreme stated in its 25 February 2013 CDA claim (below) that Mod. 10 was a final negotiated payment for its REA covering its POT performance from 13 December 2005 through 30 June 2006, subject only to verification of the pounds delivered. Thus, it was not subject to a rate adjustment by DLA. (Supp. R4, tab 113 at 18)

25. CO DiMeo testified in her 15 October 2013 deposition regarding Mod. 10:

> Q And how did you expect Supreme to show you what its additional costs would be when you hadn't even identified all of the sites that they would be supporting yet?
>
> A Again, operationally, they were much closer—they were on the ground. They had a facility in Afghanistan. They had contacts in the military. They had a lot more intelligence of the operational situation than I did myself. So I was pretty confident in that end.
>
> Major Alvarez was a major in the U.S. Army and worked for DLA Europe prior to working for Supreme, and I knew that his operational knowledge was much greater than my own.

(Gov't ex. 5 at 88-89) Supreme alleges that the CO also relied upon the expertise of her DLA colleagues and upon military personnel when she had questions about operational issues (AIF at 23, ¶ 32).

26. Regarding Mod. 10, CO DiMeo stated in her 5 December 2014 declaration in support of DLA's motion:

> 6. Supreme and DLA agreed to negotiate rates for [POT] that were in lieu of the rates initially provided under the contract, as solicited. Initially, that negotiation was principally conducted by me and Joseph Alvarez.
>
> 7. At the time of this negotiation, Mr. Alvarez was a Director at Supreme. However, prior to his employment with Supreme, Mr. Alvarez was a former employee at DLA working in an office located in Europe.
>
> 8. I generally recall that Mr. Alvarez was involved in acquisition planning for the SPV contract while a DLA employee. Furthermore, I believe that Mr. Alvarez served as a [CO] while a DLA employee, working on matters pertaining to DLA's [SPV] programs.

9. Negotiations over how to structure rates for [POT] began in or around the summer of 2005. During these negotiations, I was attempting to obtain from Supreme an understanding of their actual costs and profit rates for POT performance. I also attempted to obtain from Supreme the company's projected costs and profit rates for POT moving forward.

10. Supreme's projected costs and profit rate for [POT] were material to my "fair and reasonable" analysis and whether the parties could finalize POT rates through a contract modification. This is evident from the fact that I ultimately requested [a DCAA audit] on Supreme's actual costs to perform [POT].

11. During negotiations leading up to [Mod. 10], I understood Supreme's projected POT profit rates to be in the general range of 10 to 16%, depending on the mode of transport. My understanding of Supreme's projected POT profit rates was based upon representations from Mr. Alvarez and other Supreme personnel.

....

13. Under [Mod. 10], DLA agreed to pay Supreme 75% of the following rates: $2.65 (fixed wing); $8.35 (rotary wing); and $0.48 (ground). Had I known that Supreme's projected profit rates and costs were different than what was represented to me by Supreme, I would not have entered into [Mod. 10], as executed.

14. Subsequent to entering into [Mod. 10], I learned that Supreme was the target of a criminal investigation regarding its relationship with Jamal Ahli Foods Co. LLC [JAFCO].

15. I further learned that during the time period leading up to [Mod. 10] and continuing thereafter, Supreme was using JAFCO as a middleman to pass hidden charges on to DLA for fresh fruits and vegetables [FF&V]. Had I known about these hidden charges I would not have entered into [Mod. 10], as executed.

> 16. Additionally, I learned subsequent to [Mod. 10] that Supreme failed to pass on required discounts to DLA. Under the SPV contract, Supreme was required to return "rebates and discounts" attributable to sales resulting from DLA orders. Based on agreements between JAFCO and suppliers such as Barakat, Supreme enjoyed various early-payment discounts. However, these discounts were not passed on to DLA. Had I known that Supreme did not intend to pass on required discounts, I would not have entered into [Mod. 10], as executed.

(Gov't ex. 7 at 2-4) Supreme disputes the CO's declaration concerning what she would have done regarding Mod. 10 if she had more information, as hearsay evidence created many years later. Supreme notes that the declaration was prepared after the CO's deposition and has not been subject to cross-examination (AIF at 63, ¶ 69).

Modification No. P00012

27. Bilateral Mod. No. P00012 (Mod. 12), effective 10 October 2006, signed by Mr. Alvarez for Supreme on that date, stated:

> A. This is an addendum to [Mod. 10]... On a monthly basis, from July 2006 onward, DSCP will reimburse Supreme at 75% of the tentative agreed rate, until final results of the DCAA audit have been completed. At that time, once an ongoing [POT] rate has been established, any additional adjustments will be made.
>
> B. All other terms and conditions remain unchanged.

(R4, tab 9) POT was to be paid on a per pound basis for net product weight delivered (AUF ¶ 50; GIF ¶ 50).

Miscellaneous Matters Concerning Supreme's POT Billing

28. In a 25 January 2007 email to Mr. Alvarez, copied to Mr. Orenstein, Mr. Epp, of Supreme, referred to preparation for a DCAA audit, a "possible gap/risk," and an analysis of outbound road transportation costs to FOBs compared to revenue and charges to DLA (gov't ex. 31 at 2). Mr. Epp stated:

> I am pretty concerned that we might have problems to really justify the gap and therefore would like to start to work with operations immediately in order to put that additional cost together. ...As we have learnt...there is no way of getting

> around the audit and these audits just require presentation of actual cost, nothing else.

(*Id.* at 3) In a 1 February 2007 email to Mr. Alvarez, copied to Mr. Orenstein, Mr. Epp again referred to the billing and cost gap:

> I expect the total gap YTD Dec 2006 being at approx **$40m**.
>
> ....
>
> As this gap is quite likely more than we might be able to justify...we need to develop a strategy how to deal with this before we enter into the audit process or announce any faulty billing to DSCP.

(Gov't ex. 30 at 1) Supreme terminated Mr. Epp's employment in or about March 2007 (gov't ex. 4 (*qui tam* complaint), ¶¶ 13, 265).

29. On 9 November 2009 the United States unsealed a criminal indictment against PWC, accusing it of major fraud in connection with its Zone 1 Iraq PV contract. The indictment alleged that, in its bid, PWC had misrepresented its buying power for food items. *Agility PWC* at 707-08. (*See* AUF ¶ 25; GIF ¶ 25)

30. On 14 September 2011 DLA asked Supreme about POT invoicing with regard to net product weight:

> A number of the Supreme [POT] invoices submitted to [DLA] have been reflecting weights greater than the net product weight received and accepted. The net product weight actually received and accepted by FOB customers is what should be reflected on Supreme['s] invoices. Please explain why this is happening and how this situation will be rectified.

(Gov't ex. 48 at 2-3) Supreme responded that it was verifying its POT process (*id.* at 2).

31. Eventually DLA stopped paying POT invoices (GUF ¶ 110; AIF ¶ 110). On 15 September 2013 Supreme wrote to the CO:

> [DLA] has not paid Supreme invoices for POT since May 2013 because of a[n] issue related to the calculation of billable weight. Specifically, [DLA] has challenged the longstanding practice of calculating, invoicing and paying the billable weight for POT air by deducting 30 pounds from the

airway bill to adjust for the weight of shipping material, such as the pallet, packaging, and dry ice.

(Gov't ex. 51) Solely to reinstate payment, Supreme agreed to resubmit its POT invoices based upon net product weight only, even though it did not agree that the contract so required. It reserved its right to file a claim.

2008 DCAA Audit Report and Rate Negotiations

32. On 19 December 2008 DCAA issued an audit report to the CO addressing Supreme's REA and POT costs (R4, tab 30; AUF ¶ 67; GIF ¶ 67). DCAA opined that Supreme's documentation was inadequate; the proposal was not prepared in all respects in accordance with FAR Part 31 and the DFARS; and the proposal was not an acceptable basis for negotiation (R4, tab 30 at 2; AUF ¶ 69; GIF ¶ 69).

33. On 5 May 2009, referring to revised rates provided by Supreme to DCAA on 17 June 2008 (*see* app. ex. 29), the CO stated that she had not yet received approval to open negotiations but, as part of contract administration, she was modifying the "tentative" rates established under Mod. 10; DLA would seek reimbursement related to payments issued between 15 June 2008 and 14 March 2009; and a modification would incorporate the changes into the contract (app. supp. R4, tab 57).

34. On 24 July 2009, the CO notified Supreme that negotiations were opened regarding its POT proposal. Supreme could: revise its rates for all three transportation modes because supporting information and rates provided to DCAA were said to be "significantly lower;" provide additional documentation for costs DCAA questioned; and revise its offered minimum billable weights for the three modes. The CO also stated:

> 4. For locations other than the original four, Supreme billed DSCP the original normal distribution plus the premium outbound distribution. It is DSCP's position since [POT] is being paid separately; the portion for transportation included in the original normal distribution should be reimbursed/credited to DSCP.
>
> 5. [Page 75 of the solicitation states] if "additional land based customer locations are added to post award, the distribution fee per the contract award term will apply." It is DSCP's position that some of the additional land based customer locations with comparable distance and/or threat level as the original four destinations should be covered by the distribution fee.

(R4, tab 31 at 1) The negotiations did not result in an agreement between DLA and Supreme on POT rates (AUF ¶ 77; GIF ¶ 77).

35. On 23 June 2010 the CO executed unilateral Mod. No. P00073, effective 30 April 2010, which set rates for all payments made from 30 April 2010 until POT prices were definitized (R4, tab 18). Supreme protested that the rates were punitive and far below provisional rates to which both parties had agreed and a DLA 12 June 2010 offer for final rates. In bilateral Mod. No. P00076 (Mod. 76), effective 5 August 2010, the parties agreed to the 12 June 2010 POT rates as provisional until final rates were definitized. (R4, tabs 19, 47; supp. R4, tab 113 at 21-22)

Contract Modifications and 2010-2011 DCAA Audit

36. On 31 August 2010 the CO requested a revised POT proposal from Supreme so that DLA, or the parties, could definitize the rates for fixed-wing, rotary-wing and ground transportation. The CO stated that an audit of actual allowable costs was necessary. (R4, tab 48 at 1) On 15 October 2010, Supreme submitted a revised proposal, which DLA asked DCAA to audit (R4, tabs 55, 56). Supreme stated that, while it had provided POT cost information, benchmark prices for comparable transportation services were the most appropriate basis for negotiations. It asserted that, under its FAR Part 12 commercial items contract, FAR Parts 15 and 31 did not apply. (App. supp. R4, tab 74) [8]

37. On 29 August 2011, DCAA issued a report on Supreme's 15 October 2010 proposal (R4, tab 102 at 1). The report noted that Supreme was then servicing 239 FOBs in Afghanistan (*id.* at 10). Of $702,746,404 in proposed costs, DCAA examined $602,583,118 and questioned $375,697,758 (*id.* at 24). Among other alleged problems, including denial of access to fuel records and that Supreme was unable to locate a significant number of documents concerning rotary, fixed-wing and road costs, DCAA opined that parts of Supreme's proposal were not an acceptable basis for negotiation; supporting information was inadequate; and the proposal was not prepared in all respects in accordance with FAR Part 31 (*e.g.*, *id.* at 1, 2, 4-5, 7-9, 24-25).

JAFCO

38. After award of the SPV contract, Supreme formed JAFCO in the United Arab Emirates, which it effectively owned and controlled. From about July 2005 through about April 2009, JAFCO marked up LMR goods it purchased, which increased the delivered price that Supreme charged DLA. From about July 2005 through about

[8] Appellant earlier moved for a declaratory judgment that DLA improperly applied FAR Part 31 cost principles to the fixed-price FAR Part 12 commercial items SPV contract when it evaluated the parties' claims and that it thereby breached the contract. It also moved for other declaratory relief. The Board has held those prior motions in abeyance because the instant motions could be dispositive.

April 2007, Supreme used JAFCO to markup bottled water so as to increase the delivered price that Supreme charged DLA for water. In April 2007, Supreme changed its pricing for bottled water by charging a weighted price that was periodically adjusted to account for changes in its suppliers' prices. (Gov't ex. 43, attach. B at 2; AUF ¶¶ 80-84; GIF ¶¶ 80-84) On 20 September 2007, Supreme advised the CO that a relationship existed between Supreme and JAFCO (app. ex. 30).

39. The CO and Supreme met on 24-25 September 2008. DLA's contracting supervisor, Mr. Shifton, was present. A meeting agenda includes under the topic "FINANCIAL ISSUES": "8. Jafco charges – distribution fee adjustment." (App. ex. 31 at 1; AUF ¶ 86; GIF ¶ 86) Supreme has not identified the agenda's author nor directed the Board to direct evidence that a JAFCO discussion occurred, although an outline by counsel of an apparent 15 June 2009 presentation to DLA, the U.S. Department of Justice (DOJ), the Defense Criminal Investigative Service, and the Army Criminal Investigation Command on behalf of Supreme, states that JAFCO was discussed at a September 2008 meeting (app. ex. 34 at 1, 100).

40. On 16 March 2009 the CO directed Supreme to provide a written explanation of alleged pricing irregularities, including that "[c]osts attributable to your subsidiary, JAFCO, which under the contract terms belong in your fixed distribution fee, appear to have been included in delivered prices" (app. ex. 32). Supreme responded that it would provide pricing for FF&V that directly reflected the cost charged to JAFCO by its suppliers, but it disagreed with DLA's position (app. ex. 33).

41. An outline by counsel of an apparent 22 October 2009 presentation on behalf of Supreme to DOJ and DLA includes JAFCO as a topic (organization, functions, invoice summary) (app. ex. 35 at 1, 2, 56-67). Supreme disclaimed JAFCO invoicing irregularities (*id.* at 57).

Other Modifications and Miscellaneous

42. DLA issued over 100 contract modifications (AUF ¶ 92; GIF ¶ 92). Bilateral Mod. No. P00019, effective 15 May 2007, stated that, except as provided in the modification, all terms and conditions of the contract remained "unchanged and in full force and effect" (app. ex. 36 at 1). In addition to those mentioned below, subsequent bilateral modifications contained the same language (app. ex. 37 at 1, ex. 38 at 1, ex. 39 at 1).

43. Bilateral Mod. No. P00043 (Mod. 43), effective 6 November 2007, issued under the DLAD Changes-Military Readiness clause, stated that it was to clarify Mod. 10's POT rates and to add a category. DLA was to "continue to reimburse Supreme at 75% of the tentative agreed rates in accordance with [Mod. 12]" and "[a]ll other terms and conditions remain[ed] unchanged." (R4, tab 14 at 1-2)

44. Bilateral Mod. No. P00092 (Mod. 92), effective 20 December 2010, sometimes referred to as the "bridge contract," extended the contract through 12 December 2011 and included two additional six-month option periods (R4, tab 22 at 1; ASBCA No. 59811 (59811) R4, tab 7 at 5). It provided that, unless specifically changed in the modification, all terms and conditions of the contract applied to performance under the modification and that unresolved claims and REAs based upon events that occurred prior to 20 December 2010 were not affected by the modification (R4, tab 22 at 2). Mod. 92 stated:

> II. ...Supreme agrees to disclose the price paid by Supreme or its affiliates for delivery of products to Supreme or an affiliate of Supreme. Supreme affiliates include Supreme aviation operation and [JAFCO]. Supreme will disclose all discounts and refunds of any kind received by Supreme from any source for all products and identify all Supreme affiliates involved in any way in performance of the contract, at any tier.... The delivered pricing for water [and other charges] are covered under [earlier modifications] and shall remain unchanged.
>
> ....
>
> ...The rates for [POT] are subject to negotiation and will be addressed after the DCAA audit. The provisional rates from [Mod. 76] are still in effect under this modification.
>
> ....
>
> IV. Supreme agrees to cooperate in any Government investigation relating to [the SPV contract], including any modifications or extensions thereto. Cooperation includes making officials available for interviews, production of records, and other assistance requested by the Government.

(*Id.* at 3) Mod. 92 added an inbound airlift distribution fee category that included a premium distribution fee measured by net product weight that applied to FF&V and LMR items. The fee covered JAFCO, Tri-Wall and Inbound Air charges. (*Id.* at 15; AUF ¶ 99; GIF ¶ 99) On 8 December 2010, prior to Mod. 92, Supreme had sent the CO an "Inbound Air Model" breaking out the components of what it described as a "Bridge Inbound Air Rate," showing that it included a JAFCO charge (app. ex. 40).

45. On 9 December 2011 DLA executed unilateral Mod. Nos. P00107 and P00109, exercising its two options and extending the contract to 12 December 2012. Each modification stated that "[u]nless specifically changed in this modification, all

terms and conditions of the contract apply to the performance under this modification" (R4, tab 25 at 2, tab 27 at 2).

CO's First Final Decision (Government Claim), Extension of Contract Performance

46. On 9 December 2011 the CO issued a final decision, unilaterally definitizing POT rates, per pound, in Afghanistan, which she alleged were reasonable based upon Supreme's incurred costs plus a reasonable profit. She stated that there were about 264 FOBs at the time. The rates were to apply as of 12 December 2005, until the end of contract performance. Stating that DLA required reimbursement of payments made based upon minimum billable weights to the extent they exceeded what should have been paid using actual weights, the CO demanded payment from Supreme of $756,908,587. (R4, tab 111) On 14 December 2011 Supreme appealed to the Board, which docketed the appeal as ASBCA No. 57884.

47. Effective 22 June 2012, the parties executed what they have described as a contract extension from 13 December 2012 through 12 December 2013. The document referred to a sole source contract award but retained the same contract number as the SPV contract and incorporated its terms, including modifications. (App. ex. 23 at 1-2; *see* AUF ¶ 106; GIF ¶ 106) It stated that "[u]nresolved claims and [REAs] based on events that occurred before December 12, 2012 under [the SPV contract] are not affected by this new contract" (app. ex. 23 at 2). The "contract extension" contained FAR 52.212-5, CONTRACT TERMS AND CONDITIONS REQUIRED TO IMPLEMENT STATUTES OR EXECUTIVE ORDERS--COMMERCIAL ITEMS (MAY 2012), which provided that the contractor was to comply with FAR 52.203-13, CONTRACTOR CODE OF BUSINESS ETHICS AND CONDUCT (APR 2010) (Pub. L. No. 110-252, Title VI, Chapter 1 (41 U.S.C. 251 note)) (DLA ex. 53 at 30).[9] FAR 52.203-13 provides at paragraph (b)(3)(i) that:

> The Contractor shall timely disclose, in writing, to the agency Office of the Inspector General (OIG), with a copy to the [CO], whenever, in connection with the award, performance, or closeout of this contract or any subcontract thereunder, the Contractor has credible evidence that a principal, employee, agent, or subcontractor of the Contractor has committed—
>
> (A) A violation of Federal criminal law involving fraud, conflict of interest, bribery, or gratuity violations found in Title 18 of the United States Code; or

[9] The contract, at award, contained the June 2004 version of FAR 52.212-5. FAR 52.203-13 was not yet promulgated.

(B) A violation of the civil False Claims Act (31 U.S.C. 3729-3733) [hereafter "FCA"].

48. Under the SPV contract DLA paid Supreme approximately $8.8 billion between December 2005 and December 2013 (gov't ex. 43, attach. B at 2).

Supreme's CDA Claim and CO's Second Final Decision

49. On 25 February 2013 Supreme submitted a $1,802,335,141.38 certified CDA claim to the CO, the amount it alleged it should have been paid for POT through 12 December 2012, based upon the negotiated POT rates in Mods. 10 and 43, less net amounts already paid (supp. R4, tab 113 at 1, 6, 47). Supreme summarized:

> POT was a significant change to the Contract. [DLA] effectively transformed what was supposed to be a wholesale supply service contract with deliveries to a handful of distribution centers into a retail sales operation requiring deliveries to hundreds of end-user customers in some of the most dangerous and inaccessible locations in the world.... Supreme eventually took responsibility for POT deliveries of nearly 3 billion pounds of food and non-food products to over 150 FOBs with over 250 unique [DOD] locations throughout Afghanistan.

(*Id.* at 2) Supreme alleged that it had performed these services for months without payment and, by the time DLA approved the negotiated POT rates and began paying in August 2006, Supreme had performed more than $30 million of the POT effort and was in urgent need of payment (*id.* at 13-15, 17-18). Supreme contended that DLA had breached the contract by unilaterally establishing POT rates and improperly applying FAR Part 31 cost principles to the subject FAR Part 12 commercial items contract. Supreme alleged that it was entitled to an upward adjustment in the contract price reflecting POT rates based upon price, not cost, pursuant to FAR Parts 12 and 15, which accounted for the significant risks Supreme undertook when it agreed in August 2005 to provide POT support for five years at fixed rates. Supreme asserted that the appropriate rates were those to which the parties had agreed in August 2006 under Mod. 10, as supplemented by Mod. 43 in November 2007. (Supp. R4, tab 113 at 5) Supreme claimed that Mod. 10 was a final negotiated payment for its REA covering its POT performance from 13 December 2005 through 30 June 2006, subject only to verification of pounds delivered. It was not subject to a rate adjustment by DLA and should not have been affected by the unilateral rate determination in the CO's final decision. (*Id.* at 18 n.6) Alternatively, Supreme alleged that DLA's unilateral establishment of POT rates and incorporation of FAR Part 31 principles were changes and/or constructive contract changes for which Supreme was entitled to an equitable adjustment (*id.* at 26 n.9).

50. On 10 May 2013 CO Lourdes Valentin issued a final decision on Supreme's 25 February 2013 claim. She stated that, due to alleged audit objections by Supreme, she was currently unable to evaluate its claim and must deny it. On 14 May 2013 Supreme appealed to the Board, which docketed the appeal as ASBCA No. 58666 and consolidated it with ASBCA No. 57884.

51. On 28 May 2014 Supreme submitted a certified $598,769,101 CDA claim to the CO for POT delivery from 13 December 2012 to 12 December 2013. On 17 October 2014 Supreme appealed from the CO's deemed denial of the claim, which the Board docketed as ASBCA No. 59636 and consolidated with ASBCA Nos. 57884 and 58666.[10]

Qui Tam and Criminal Actions, Settlement and Plea Agreement

52. On 16 March 2010 Mr. Epp, as a *qui tam* relator, filed a complaint under seal in the U.S. District Court for the Eastern District of Pennsylvania against Supreme, JAFCO, Mr. Orenstein, *et al.*, for alleged FCA violations in connection with the SPV contract (*see* gov't ex. 41 at 1). Mr. Epp filed an amended complaint on 11 September 2012, which the court unsealed on 5 December 2014 (gov't ex. 4 at cover page and 1, ¶ 1; *see* app. ex. 14). On 8 December 2014 the United States filed a notice of election to intervene in part, to effect a civil settlement between it, the relator, and defendants Supreme and Orenstein (app. ex. 14 at 1, 4). The settlement agreement, which also involved related Supreme entities, including JAFCO, was executed on 8 December 2014 and earlier that December by various parties (gov't ex. 41). It provided in pertinent part:

RECITALS

....

> C. ...[Supreme] will plead guilty to major fraud, conspiracy to commit major fraud, and wire fraud in violation of 18 U.S.C. § 1031, 18 U.S.C. § 371, and 18 U.S.C. § 1343....
>
> D. The United States contends that it has certain civil claims against Supreme for submitting false claims for payment pursuant to the [SPV contract] by means of the following:

[10] Supreme filed other claims that were not centered on POT. Its appeals from the CO's deemed denials of those claims, and its appeals from other CO's decisions asserting government claims, are captioned above. The parties have requested that their motions cover all appeals filed.

1. Falsely representing the invoiced price a related entity, [JAFCO], charged for the purchase of [LMR] items as the "Delivered Price" within the meaning of that term under the [SPV contract], rather than the lower price invoiced to JAFCO by manufacturers and suppliers of LMR items during the period July 2005 through April 1, 2009;

2. Falsely representing invoiced prices of bottled water as the "Delivered Price" within the meaning of that term under the [SPV contract], rather than the actual lower priced water invoiced to Supreme from bottled water vendors during the period December 2005 through April 2007; and

3. Obtaining from various vendors located in the United States certain discounts and rebates that it failed to disclose or pass through to DSCP, as required by the [subject contract], by falsely characterizing such discounts and rebates as discounts for prompt payments and marketing allowances when, in fact, some of them were not, during the period June 2005 to December 2010.

The conduct described in Recital Paragraph D shall hereafter be referred to as the "Covered Conduct." As a result of the Covered Conduct, the United States alleges that Supreme knowingly caused false and/or fraudulent claims to be submitted to the United States through the DLA under the [SPV contract].

E. This Agreement is neither an admission of liability by Supreme nor a concession by the United States that its claims are not well-founded. Supreme expressly denies the allegations of the United States and Relator as set forth herein, and denies it engaged in any wrongful conduct in connection with the Covered Conduct, with the exception of such admissions that are made by certain Supreme entities in connection with the Plea Agreements.

....

TERMS AND CONDITIONS

....

4. *Subject to the exceptions in Paragraph 6 below (concerning excluded claims, counterclaims and affirmative defenses)*, and conditioned upon Supreme's full payment of the Settlement Amount, the United States releases Supreme [*et al.*] from any civil or administrative monetary claim the United States has for the Covered Conduct under the [FCA]...; the [CDA]; or the common law theories of breach of contract, payment by mistake, unjust enrichment, and fraud.

5. [Releases by Relator]

6. *Notwithstanding the releases given in Paragraphs 4* and 5 of this Agreement, or any other term of this Agreement, *the following claims, counterclaims and affirmative defenses of the United States are specifically reserved and are not released*:

....

(c) Except as explicitly stated in the Agreement, any administrative liability, including the suspension and debarment rights of any federal agency;

(d) Any liability to the United States (or its agencies) for *any conduct other than the Covered Conduct*, including for the claims and affirmative defenses of the United States set forth in [the subject litigation before the Board], and any other administrative contract claims with respect to the [SPV contract] that the United States has asserted, could have asserted, or may assert in the future against Supreme under the [CDA]....

7. *Nothing in this agreement, including the releases in Paragraphs 4* and 5, *shall preclude the United States from asserting any affirmative defense for any conduct, including the Covered Conduct*, with respect to [the SPV contract] that the United States has asserted, could have asserted, or may assert in the future against Supreme in any and all appeals of Supreme filed before the [ASBCA]..., or preclude Supreme from defending against, seeking dismissal of, opposing, or

> otherwise challenging any such affirmative defense that the United States has asserted, could have asserted, or may assert in the future against Supreme in any and all appeals of Supreme filed before the [ASBCA]....
>
> ....
>
> 10. Supreme fully and finally releases the United States...from any claims...that Supreme has asserted, could have asserted, or may assert in the future against the United States..., related to the Covered Conduct and the United States' investigation and prosecution thereof. Supreme specifically reserves and excludes from this release the claims of [Supreme] set forth in [the subject litigation before the Board], and any administrative contract claims under the [SPV contract] for conduct unrelated to the Covered Conduct that [Supreme] has asserted, could have asserted, or may assert in the future against the United States or its agencies under the [CDA].

(*Id.* at 1-8) (Emphasis added) As part of the settlement of the civil *qui tam* action, Supreme paid $101 million to the U.S. government, $300,000 to Mr. Epp and $1.15 million to Mr. Epp's counsel (gov't ex. 41 at 3-4; GUF ¶ 75; AIF ¶ 75). Additionally, on or about 3 October 2014, Supreme had paid DLA $38,362,198.71 for "WATER TRUE UP" (*see* SOF ¶ 38) (gov't exs. 42, 43 at 4, ¶ 3g).

53. On 8 December 2014, the United States filed a Criminal Information against Supreme and a related entity in the District Court, alleging violations of 18 U.S.C. § 1031 (major fraud against the United States); 18 U.S.C. § 371 (conspiracy to commit major fraud against the United States); and 18 U.S.C. § 1343 (wire fraud). The same day, under a 22 September 2014 Guilty Plea Agreement, Supreme pled guilty to the above violations. (Gov't exs. 39, 40, 43; DIF, ex. 1) It agreed not to contest a $10,000,000 criminal forfeiture, "arising from [Supreme's] scheme to defraud the United States, and in particular, [DLA], with respect to the prices for acquiring and delivering food and water for the U.S. troops stationed in Afghanistan under [the SPV contract] between December 2005 and April 2009" (gov't ex. 43 at 1-2). Supreme also agreed to dissolve JAFCO (*id.* at 3, ¶ 3.e.). Supreme and a related entity paid a total of $288.36 million to the United States (DLA exs. 40, 43; GIF, ex. 1; GUF ¶ 74; AIF ¶ 74). Supreme's Guilty Plea Agreement stated that "[t]he defendant and the government agree that the fine, restitution and forfeiture payments...represent[] a fair and just resolution of all issues associated with loss, fine, and forfeiture calculations" (gov't ex. 43 at 3, ¶ 3. d.).

CO's Third Final Decision

54. On 22 January 2015 the CO issued a final decision claiming that Supreme owed the government $8,231,152,631.09 for all sums it paid under the contract, plus its costs to review the allegedly unsupported parts of Supreme's claims, less the amounts Supreme paid pursuant to the CO's 9 December 2011 final decision, its water "TRUE UP," and its restitution payment in the criminal proceedings. The CO claimed that the contract was tainted and void *ab initio* because: (1) Supreme made material misrepresentations regarding its proposed POT rates, purported costs and profits, and its willingness to cooperate with DCAA, which corrupted the contract and fraudulently induced DLA to enter into Mods. 10 and 12; (2) Supreme pled guilty to major fraud against the United States regarding its use of JAFCO to inflate product prices and, had the CO known of Supreme's relationship to JAFCO and its intention secretly to inflate the delivered price under the contract using JAFCO, the CO would not have entered into Mods. 10 and 12, as executed; additionally, Supreme had enjoyed early-payment discounts due to agreements between JAFCO and its suppliers but had violated the contract requirement to pass the discounts on to DLA, and it had inflated the "delivered price" of bottled water, again using JAFCO as an intermediary; (3) although the contract did not allow Supreme to include packaging, such as pallets or tri-walls, as part of the product weight used to calculate POT charges, it knowingly billed DLA for weights higher than the net weights of delivered products; (4) through a partnership with PWC and PCA, Supreme made material misrepresentations regarding its market-basket pricing, which fraudulently induced DLA to enter into the contract; after Supreme's proposal, it changed the source of certain market-basket items from apparent third-party companies to JAFCO; and it failed to report its inflated pricing after it became aware of PWC's major fraud (*see* SOF ¶ 29);[11] and (5) through MAJ Alvarez and other unidentified persons, Supreme violated conflict-of-interest restrictions and failed to notify the CO. (ASBCA No. 59811 (59811), R4, vol. 1 (Contract), tab 7 at 1, 4-9)[12]

55. On 30 January 2015 Supreme appealed to the Board from the CO's final decision, which docketed the appeal as ASBCA No. 59811 and consolidated it with ASBCA Nos. 57884, 58666, and 59636.

56. In the lead appeal, ASBCA No. 57884, DLA asserted the following affirmative defenses in its 20 January 2015 answer (filed prior to the CO's 22 January 2015 decision) to Supreme's second amended complaint: (1) assumption of risk; (2) conflict of interest; (3) fraud in the inducement; (4) first material breach/breach of contract; (5) failure to mitigate; and (6) sovereign acts. DLA asserted affirmative defenses (2) through (4), although sometimes numbered and worded differently, in all of

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[11] DLA has not moved for summary judgment on this allegation (tr. 79, 94-95).

[12] The decision omitted the contractor's CDA appeal rights but Supreme was not prejudiced as it promptly appealed to the Board.

the captioned appeals from the denial or deemed denial of Supreme's claims.[13] Those defenses are the subject of Supreme's motion to dismiss/strike. Regarding defense (2), DLA alleged that former DLA employees "switched sides" on the contract and systematically violated Federal conflict-of-interest statutes on behalf of Supreme, both during contract formation and development of the POT provisions. Regarding defense (3), DLA alleged that Supreme committed fraud in the inducement by making material misrepresentations regarding its market-basket pricing, its proposed rates for Mods. 10 and 12, and its relationship with JAFCO. In the case of defenses (2) and (3), DLA alleged that Supreme's actions rendered the contract void *ab initio*, requiring that it reimburse the government for all monies paid under the contract. With respect to its first material breach defense (4), DLA contended that it was not required to pay Supreme under the contract because Supreme committed the first material breach in at least five ways: (1) it systematically overcharged the government by inflating the net product weight of goods delivered; (2) it overcharged the government for bottled water; (3) it failed timely to disclose evidence of a violation of Federal criminal law, including stemming from its relationship with PWC; (4) it did not pass on early-payment discounts to DLA; and (5) it failed to cooperate in good faith with DCAA's audit because it knew it could not justify the substantial undisclosed gap between Supreme's actual costs to perform and its proposed POT rates.

DISCUSSION

We first consider Supreme's motion to dismiss for lack of jurisdiction because resolution of that motion in its favor would mean we could not entertain DLA's claims or its affirmative defenses at issue. However, contrary to Supreme's motion, such a dismissal would be without prejudice and not on the merits. *Dick Pacific/GHEMM JV*, ASBCA Nos. 55562, 55563, 07-1 BCA ¶ 33,469 at 165,920.

Supreme's Motion to Dismiss DLA's Claims/Affirmative Defenses of Fraud in the Inducement, Conflict of Interest and First Material Breach for Lack of Jurisdiction

Supreme contends that DLA's affirmative defenses of fraud in the inducement, conflict of interest and first material breach are actually claims, because DLA seeks the same relief, including monetary recovery, that it demanded under the CO's 22 January 2015 final decision (SOF ¶ 54). Thus, they are subject to the jurisdictional requirements and defenses applicable to claims and must be dismissed for lack of jurisdiction. At oral argument DLA withdrew the monetary components of its defenses. It is now seeking reimbursement only under the noted final decision, which asserted the affirmative claim that the contract was void *ab initio* and demanded the return of monies the government paid to Supreme. DLA stated that the scope of the recovery to which it is entitled is not

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[13] Over appellant's objection, on 25 February 2015 the Board granted DLA's motion to amend its answers in all of the appeals then pending to assert the affirmative defenses of fraud in the inducement, conflict of interest and first material breach.

before the Board on its motion for summary judgment. (Tr. 85-86; DLA opp'n and reply at 83)

Supreme asserts that, regardless, the Board lacks CDA jurisdiction to consider DLA's claims/defenses in question because they require the Board to determine whether Supreme committed common law fraud or submitted false claims in violation of the FCA or violated federal criminal law pertaining to conflicts of interest, which the Board has no authority to do. DLA disputes Supreme's jurisdictional stance, as set forth below.

I. Board Jurisdiction Over Fraud-Related and Conflict-of-Interest Matters

A. The CDA

Under the CDA, as relevant, the Board "has jurisdiction to decide any appeal from a decision of a [CO]" of DOD "relative to a contract made by" it. 41 U.S.C. § 7105 (e)(1)(A). Contractor and government claims "relating to a contract" are to be submitted to the CO for decision or be the subject of a written CO's decision, respectively. 41 U.S.C. § 7103(a)(1), (3). This is to occur within six years after claim accrual, but the limitation does not apply to a government claim that is based upon a contractor's claim involving fraud. 41 U.S.C. § 7103(a)(4)(A), (B).

The CDA states that "[t]he authority of [subsection (a) of section 7103] and subsections (c)(1), (d), and (e) does not extend to a claim or dispute for penalties or forfeitures prescribed by statute or regulation that another Federal agency is specifically authorized to administer, settle, or determine." 41 U.S.C. § 7103(a)(5). Subsections (d) and (e) pertain to the process of issuing and the contents of a CO's decision, respectively. Subsection (c) covers allegedly fraudulent claims by a contractor. Subsection (c)(1), upon which Supreme relies, states that "[t]his section does not authorize an agency head to settle, compromise, pay, or otherwise adjust any claim involving fraud."

The CDA defines "agency head" as "the head and any assistant head of an executive agency [including] the chief official of a principal division of an executive agency if the head of the executive agency so designates that chief official." 41 U.S.C. § 7101(3). The term "agency head" is not equivalent to "contracting officer," *see Joseph Morton Co. v. United States*, 757 F.2d 1273, 1280-81 (Fed. Cir. 1985), and the Board is not an "agency head," *International Oil Trading Co.*, ASBCA No. 57491 *et al.*, 13 BCA ¶ 35,393 at 173,658. The Board's authority to decide CDA appeals is statutory and not derived by delegation from an agency head. *Id.*

However, FAR 33.210, as in effect at the time of contract award, [14] applies 41 U.S.C. §§ 7103(a)(5) and (c)(1) to COs:

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[14] The current provision is substantially similar.

> Except as provided in this section, [COs] are authorized...to decide or resolve all claims arising under or relating to a contract subject to the [CDA].... The authority to decide or resolve claims does not extend to-
>
> (a) A claim or dispute for penalties or forfeitures prescribed by statute or regulation that another Federal agency is specifically authorized to administer, settle, or determine; or
>
> (b) The settlement, compromise, payment or adjustment of any claim involving fraud.

In these appeals there is no government claim for penalties or forfeitures prescribed by statute or regulation and the CO did not settle, compromise, pay or adjust any claim involving fraud.

B. *Simko*

Supreme relies upon *Martin J. Simko Construction, Inc. v. United States*, 852 F.2d 540 (Fed. Cir. 1988), for its contention that the Board lacks jurisdiction under the CDA to adjudicate DLA's fraud-related claims. The issue in *Simko* was whether the U.S. Claims Court[15] was correct that it lacked jurisdiction to consider the government's fraud-based defense (described by the court as a counterclaim), which had invoked a Special Plea in Fraud under 28 U.S.C. § 2514, and to consider the government's counterclaims under the FCA and the CDA's "anti-fraud" provision, then 41 U.S.C. § 604, now § 7103(c)(2),[16] because they were not the subject of a CO's decision. Because the U.S. Court of Appeals for the Federal Circuit in *Simko* concluded that the CDA was unclear as to whether Congress intended the disputes provisions of 41 U.S.C. § 605(a), now § 7103, to apply to the CDA's "anti-fraud" provision, the court examined the CDA's legislative history.

The Federal Circuit found that the Senate Judiciary Committee had "plainly stated" its intent to separate fraud claims under then section 604's anti-fraud provision from other contract claims, *Simko*, 852 F.2d at 546. The committee's report stated:

> Consistent with the limitations expressed in section 4(a) [41 U.S.C. § 605(a)], excluding issues of fraud against the United States from the authority of contracting agencies to

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[15] The U.S. Court of Federal Claims succeeded the Claims Court.

[16] The anti-fraud provision states that, if a contractor is unable to support any part of its claim due to its misrepresentation of fact or fraud, it is liable to the government for an amount equal to the unsupported part of the claim plus the government's costs of reviewing the unsupported part of the claim. 41 U.S.C. § 7103(c)(2).

> consider or resolve, actions to enforce the Government's rights under section 4(b) [41 U.S.C. § 604] would be solely the responsibility of [DOJ] and would be instituted by the United States in a court of competent jurisdiction....
>
> If such cases do arise and are thus handled in the courts, other parts of the claim not associated with possible fraud or misrepresentation of fact will continue on in the agency board or in the Court of Claims where the claim originated.

S. Rep. No. 1118, 95th Cong., 2d Sess. 20, *reprinted in* 1978 U.S.C.C.A.N. 5254.

The Federal Circuit determined that:

> [A]s the legislative history clearly shows, the changes made to sections 604 and 605(a) were designed, among other things, to clarify the exclusion of fraud claims from agency jurisdiction....
>
> ....
>
> *The CDA Anti-Fraud Counterclaim.* We have determined that Congress did not intend fraud claims by the government to be included in the dispute process outlined by section 605(a) and that Congress never intended to include claims brought under section 604 to be within the agency dispute resolution process.

Simko, 852 F.2d at 545.

As relevant here, the CDA's legislative history is not clear or controlling; the statute itself does not contain the jurisdictional limits appellant would impose (*see, e.g., Caminetti v. United States*, 242 U.S. 470, 485 (1917)("It is elementary that the meaning of a statute must, in the first instance, be sought in the language in which the act is framed;" *accord BedRoc Ltd., LLC v. United States*, 541 U.S. 176, 186 n.8 (2004) (no resort to legislative history if statute clear). For example, contrary to the committee's report, nothing in the CDA's language excludes fraud or potential fraud issues from contracting agencies' authority to "consider." They must at least consider them in determining how to proceed, including whether to refer them to DOJ. In any event, the Federal Circuit in *Simko* concluded that the government's Special Plea in Fraud defense and its FCA and CDA anti-fraud provision counterclaims need not be the subject of a CO's decision before the Claims Court could entertain them. That was the jurisdictional

point directly at issue in *Simko*. DLA has not purported to assert a Special Plea in Fraud defense or an FCA or CDA anti-fraud provision counterclaim.[17]

In sum, neither the CDA's legislative history nor *Simko* disposes of the jurisdictional matters before us.

C. Board's Jurisdiction to Determine Whether Contract is Void *Ab Initio* – General

While the Board does not have jurisdiction to impose civil or criminal penalties and forfeitures for a fraudulent claim, it does have CDA jurisdiction to decide the parties' contract rights even when fraud has been alleged. *SIA Construction, Inc.*, ASBCA No. 57693, 14-1 BCA ¶ 35,762 at 174,984-85; *Public Warehousing Co., K.S.C.*, 13 BCA ¶ 35,460 at 173,896; *ERKA Construction Co.,* ASBCA No. 57618, 12-2 BCA ¶ 35,129 at 172,475. To that end, we have jurisdiction to evaluate alleged misrepresentations of fact. *Toombs & Co.*, ASBCA Nos. 35085, 35086, 89-3 BCA ¶ 21,993.

Our decision in *International Oil*, 13 BCA ¶ 35,393 is apt. There, the government raised an affirmative defense that contracts were obtained and tainted by bribery and fraud and thus were void *ab initio*, barring the contractor's recovery on its claims. The contractor moved to strike on the ground that the defense required the Board's determination that it had violated the Foreign Corrupt Practices Act, 15 U.S.C. § 78dd-1, which was DOJ's province and excluded from the Board's jurisdiction by CDA subsections 7103(a)(5) and (c)(1), above. The Board determined that those provisions do not apply to an affirmative defense that a contract is void *ab initio* under the common law for taint of bribery and fraud in its formation. It concluded that a government contract is void *ab initio* under the common law for such offenses or other misconduct compromising the integrity of the Federal contracting process, even without a criminal conviction. The Board stated that the contractor's reliance upon *Simko* was misplaced; "[t]here is no penalty or forfeiture imposed by a finding that a contract never came into existence;" the Board's authority is not derived from an agency head; and neither the CO's final decision nor the government's affirmative defense would settle, compromise, pay, or otherwise adjust any contractor claim involving fraud. Rather, they denied the contractor's claims entirely. *International Oil*, 13 BCA ¶ 35,393 at 173,658. Numerous other of our decisions have also concluded that we have jurisdiction to determine whether a contract is void *ab initio*. *See, e.g., Suh'dutsing Technologies, LLC*, ASBCA No. 58760, 15-1 BCA ¶ 36,058 (collecting cases where jurisdiction was exercised); *Servicios y Obras Isetan S.L.*, ASBCA No. 57584, 13 BCA ¶ 35,279 at 173,162.

Supreme alleges that the cases DLA cites in which the government has asserted that a contract is void all involve contractor claims and do not apply to government

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[17] The Court of Federal Claims has civil fraud jurisdiction under the FCA and the Special Plea in Fraud provisions of 28 U.S.C. § 2514; the Board does not. *United Technologies Corp.*, ASBCA No. 46880 *et al.*, 95-2 BCA ¶ 27,698 at 138,079 n.1.

claims. DLA responds with three cases involving a government claim that a contract was void, although they are not Board cases (DLA opp'n and reply at 21-22). The Board in *International Oil* did suggest, without deciding, that there could be a jurisdictional distinction between a government affirmative claim for monetary damages based upon a contractor's alleged fraud and a government affirmative defense based upon fraud-related issues when no monetary recovery was sought, citing *Environmental Safety Consultants, Inc.*, ASBCA No. 53485, 02-2 BCA ¶ 31,904. In the latter case, the Board denied appellant's motion to strike the government's affirmative defense involving fraud. It stated that the fraud allegation was not a government claim but a defense to appellant's claim, and the fact that fraud might have been practiced in the preparation and submission of a claim does not deprive the Board of its CDA jurisdiction. The Board did not decide that a government claim involving fraud-related issues could not proceed for lack of jurisdiction. As in *International Oil*, that question was not before it.

In its jurisdictional analysis in *Simko*, the court stated that it was irrelevant whether the Special Plea in Fraud was raised as a defense or counterclaim. 852 F.2d at 542. For jurisdictional purposes, we find the question of whether the government raises a fraud-related issue as a claim[18] or as a defense to be a distinction without a difference.

D. Board Jurisdiction over Fraud in the Inducement Allegations

DLA alleges that Supreme fraudulently induced the CO to enter into Mods. 10 and 12 by submitting knowingly false statements and making material misrepresentations to DLA concerning JAFCO, and Supreme's expected costs and profit, which affected its proposed rates. DLA contends that this tainted the entire contract and rendered it void *ab initio*. It asserts that the Board has jurisdiction to decide its fraud in the inducement allegations because they relate to the contract's formation and its POT provisions and the Board has the power to make factual findings and legal conclusions to determine whether a government contract exists. DLA elaborates that the Board has jurisdiction because DLA's fraud in the inducement claim and affirmative defense are grounded in contract law and do not require the Board to adjudicate whether Supreme violated a fraud statute.

Citing to the above-referenced CDA subsection 7103(c)(1), FAR 33.210(b), *Simko*, and other cases, Supreme asserts that DLA's fraud in the inducement claim and affirmative defense should be dismissed for lack of jurisdiction because they are grounded in fraud and are a legal nullity.

In fact, the Board's jurisdiction over fraud in the inducement allegations is well-established. For instance, *International Oil* essentially involved a government affirmative defense of fraud in the inducement. The Board determined that the government had alleged a causal connection between contract formation and bribery and

[18] Since all government claims come before the Board as a result of a CO's decision, we do not have counterclaim practice.

fraud. The Board's basis for assuming jurisdiction over the fraud in the inducement issue is set forth above. The Board also assumed jurisdiction over the government's fraud in the inducement challenge to the contractor's claim in *Dongbuk R&U Engineering Co.*, ASBCA No. 58300, 13 BCA ¶ 35,389, where the government alleged that the contract was void *ab initio* and the Board therefore lacked subject matter jurisdiction. The government's contention and the Board's discussion did not focus upon whether the Board had jurisdiction to consider fraud-related matters but whether there was a contractual basis for the contractor's claim. The Board stressed that its jurisdiction was based upon the appellant's pleading that there was a valid contract.

In *Range Technology Corp.*, ASBCA No. 51943, 03-2 BCA ¶ 32,290, the Board granted the government's motion to amend its answer to allege that the contractor made misrepresentations about the amount paid for a missile system and possible delivery dates, which could constitute fraud in the inducement in obtaining an advance payment and delivery extensions. The Board stated that it did not read the government's proposed fraud defense to require it to decide whether the contractor had violated the FCA, which it had no jurisdiction to do. Rather, the defense required the Board to decide whether the contractor had breached the contract by submitting a false invoice and making false representations. *See also Nexus Construction Co.*, ASBCA No. 51004, 98-1 BCA ¶ 29,375 (denying government's motion to dismiss for lack of jurisdiction, stating Board clearly has CDA jurisdiction to decide contractor's entitlement to termination costs under contract's termination for convenience clause, even though fraud alleged to have been practiced in drafting or submitting termination claim).

Further, the Board has assumed jurisdiction, without challenge, or discussion of any jurisdictional issue pertaining to the alleged fraud, in numerous cases. *See, e.g., J.E.T.S., Inc.*, ASBCA No. 28642, 87-1 BCA ¶ 19,569, *aff'd, J.E.T.S., Inc. v. United States*, 838 F.2d 1196 (Fed. Cir. 1988), *cert. denied*, 486 U.S. 1057 (1988); *L.C. Gaskins Construction Co.*, ASBCA No. 58550, 15-1 BCA ¶ 58,550; *Tri-County Contractors, Inc.*, ASBCA No. 58167, 15-1 BCA ¶ 36,017; *Atlas International Trading Corp.*, ASBCA No. 59091, 15-1 BCA ¶ 35,830; *Vertex Construction & Engineering*, ASBCA No. 58988, 14-1 BCA ¶ 35,804; *Servicios y Obras*, 13 BCA ¶ 35,279; *Francisco Garcia Gutierrez*, ASBCA No. 42984, 92-1 BCA ¶ 24,633; *C&D Construction, Inc.*, ASBCA No. 38661, 90-3 BCA ¶ 23,256.

In *J.E.T.S.*, the Board granted the government's motion for summary judgment on its affirmative defense that the contractor's claim was void *ab initio*, essentially for fraud in the inducement, because it had falsely certified that it was a small business on a 100% small business set aside contract. On appeal, the Federal Circuit affirmed the Board's decision, stating: "Considering all the circumstances, we cannot say that the Board erred in concluding that J.E.T.S. had committed fraud in obtaining this contract by knowingly falsely certifying that it was a small business." 838 F.2d at 1201.

In keeping with the Board's exercise of jurisdiction over potentially fraud-related matters to the extent that they relate to a contract's formation or administration, the Board has jurisdiction to entertain DLA's claim and affirmative defense that the contract is void *ab initio* due to fraud in the inducement. We deny appellant's motion to dismiss the claim for lack of jurisdiction and to strike the affirmative defense.

E. Board Jurisdiction over Conflict-of-Interest Allegations

DLA contends that, through MAJ Alvarez's conduct, Supreme systematically violated conflict-of-interest restrictions in connection with the SPV contract's formation and its POT provisions by violating 18 U.S.C. § 207(a)(1)'s "lifetime ban," and it violated 18 U.S.C. § 207(a)(2)'s two-year "official responsibility" restriction and 18 U.S.C. § 208(a)'s "financial interest" restriction.[19] DLA asserts that the Board has "*clear*" jurisdiction to decide its conflict-of-interest allegations, citing *United Technologies Corp., Pratt & Whitney Group, Government Engines & Space Propulsion*, ASBCA No. 46880 *et al.*, 95-2 BCA ¶ 27,644 at 137,804, for the same reasons that it has jurisdiction to decide its fraud in the inducement allegations (gov't mot. at 33-34). DLA adds that its conflict-of-interest allegations "do not require the Board to adjudicate any fraud, misrepresentations, or fraud-sounding legal elements" (gov't opp'n at 30), and none of the statutes relevant to its conflict-of-interest allegations require proof of fraud.

Supreme contends that the Board lacks jurisdiction to consider DLA's conflict-of-interest allegations for the same reasons Supreme advanced concerning DLA's fraud in the inducement allegations. Supreme also contends that the conflict-of-interest laws that DLA alleges were violated provide for criminal or civil remedies to be adjudicated by U.S. district courts that are separate from CDA processes, citing 18 U.S.C. § 218 and implementing regulations at FAR Part 3.7. Supreme further asserts that those regulations grant the contracting agency discretionary authority to seek to declare a contract void after a final conviction for a conflict-of-interest violation and provide that an agency's final decision on the matter is not a claim within the meaning of the CDA.

1. Conflict-of-Interest Statutes and Regulations

We apply the statutes and regulations in effect at the time of contract award. *See, e.g., Bowen v. Georgetown University Hospital*, 488 U.S. 204, 208 (1988) (presumption against retroactive legislation and regulations). The following statutory provisions and regulations are pertinent. Except as otherwise indicated, those in effect at the time of

[19] As reflected in the CO's 22 January 2015 final decision (SOF ¶ 54), DLA was including others in its conflict-of-interest allegations but it has since withdrawn its allegations against them "with prejudice" (gov't 10/29/15 opp'n to app. mot. to strike and for judgment on the pleadings at 22).

contract award are the same or substantially the same as those in effect when Mods. 10 and 12 were executed and currently.

Title 18 U.S.C. § 207(a)(1) (2013) provides in pertinent part:

> **Permanent restrictions on representation on particular matters**.—Any person who is an officer or employee...of the executive branch of the United States...and who, after the termination of his or her service or employment with the United States...knowingly makes, with the intent to influence, any communication to or appearance before any officer or employee of any department, agency...of the United States..., on behalf of any other person (except the United States...) in connection with a particular matter—
>
> > **(A)** in which the United States...is a party or has a direct and substantial interest,
> >
> > **(B)** in which the person participated personally and substantially as such officer or employee, and
> >
> > **(C)** which involved a specific party or specific parties at the time of such participation,
>
> shall be punished as provided in section 216 of this title.

Title 18 U.S.C. § 207(a)(2) (2013) provides in pertinent part:

> **Two-year restrictions concerning particular matters under official responsibility**.–Any person subject to the restrictions contained in paragraph (1) who, within 2 years after the termination of his or her service or employment with the United States..., knowingly makes, with the intent to influence, any communication to or appearance before any officer or employee of any department, agency...of the United States..., on behalf of any other person (except the United States...), in connection with a particular matter–
>
> > **(A)** in which the United States... is a party or has a direct and substantial interest,
> >
> > **(B)** which such person knows or reasonably should know was actually pending under his or her official responsibility as such officer or employee within a period

> of 1 year before the termination of his or her service or employment with the United States..., and
>
> **(C)** which involved a specific party or specific parties at the time it was so pending,
>
> shall be punished as provided in section 216 of this title.

Title 18 U.S.C. § 208(a) (2013) provides in pertinent part:

> Except as permitted by subsection (b) hereof, whoever, being an officer or employee of the executive branch of the United States...participates personally and substantially as a Government...employee, through decision, approval, disapproval, recommendation, the rendering of advice, investigation, or otherwise, in a...contract, claim, controversy,...or other particular matter in which, to his knowledge, he...or any person or organization with whom he is negotiating or has any arrangement concerning prospective employment, has a financial interest–
>
> Shall be subject to the penalties set forth in section 216 of this title.

In addition to provisions pertaining to imprisonment and fines, title 18 U.S.C. § 216 (2013) provides in relevant part:

> (b) The Attorney General may bring a civil action in the appropriate United States district court against any person who engages in conduct constituting an offense under section...207, 208...of this title and, upon proof of such conduct..., such person shall be subject to a civil penalty... *The imposition of a civil penalty under this subsection does not preclude any other criminal or civil statutory, common law, or administrative remedy, which is available by law to the United States or any other person.* [Emphasis added]

Title 18 U.S.C. § 218 (2013) provides:

> *In addition to any other remedies provided by law* the President or, under regulations prescribed by him, the head of any department or agency involved, may declare void and rescind any contract...in relation to which there has been a final conviction for any violation of this chapter, and the

> United States shall be entitled to recover in addition to any penalty prescribed by law or in a contract the amount expended.... [Emphasis added.]

In 2005 and 2006 implementing regulations at 5 C.F.R. § 2637.101 provided: [20]

> (a) ....Criminal enforcement of the provisions of 18 U.S.C. § 207 remains the exclusive responsibility of the Attorney General.
>
> ....
>
> (6) *Departments and agencies have primary responsibility for the administrative enforcement of the post employment restrictions found in the Act.* [DOJ] may initiate criminal enforcement in cases involving aggravated circumstances. [Emphasis added]

FAR Subpart 3.7 addresses voiding and rescinding contracts. Under FAR 3.704(a):

> In cases in which there is a final conviction for any violation of 18 U.S.C. 201-224 involving or relating to contracts awarded by an agency, the agency head or designee, shall consider the facts available and, if appropriate, may declare void and rescind contracts, and recover the amounts expended and property transferred by the agency in accordance with the policies and procedures of this subpart.

FAR 3.705 prescribes procedures for an agency head or designee to void or rescind a contract when there has been a final conviction for any violation of 18 U.S.C. §§ 207, 208 and other provisions of the statute. FAR 3.705(e) provides in part:

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[20] In 2008 the regulations were amended. Former § 2637.101 subject matter is covered in 5 C.F.R § 2641.101 *et seq*. Section 2641.101 provides that 18 U.S.C. § 207's restrictions are personal to the employee and not imputed to others (with inducement and aiding and abetting exceptions). Under 5 C.F.R. § 2641.103(a), DOJ is responsible for criminal and civil enforcement of 18 U.S.C. § 207 and an agency is required to report to the Attorney General any possible criminal conduct in violation of title 18. Section 2641.103(b) refers to criminal and civil penalties imposed by 18 U.S.C. §§ 216(a) and (b). Section § 2641.103(c) states that "[i]n addition to any other remedies provided by law," under 18 U.S.C. § 218 the United States may void or rescind contracts if there is a final conviction under section 207, and recover the amount expended.

> Rescission of contracts *under the authority of [18 U.S.C. § 218]* and demand for recovery of the amounts expended and property transferred therefor, is not a claim within the meaning of the [CDA], or part 33. Therefore, the procedures required by the statute and the FAR for the issuance of a final [CO] decision are not applicable to final agency decisions under this subpart, and shall not be followed. [Emphasis added]

2. Board's Jurisdiction Over Conflict-of-Interest Allegations

DLA cites to *United States v. Mississippi Valley Generating Co.*, 364 U.S. 520 (1961), and *K&R Engineering Co. v. United States*, 616 F.2d 469 (Ct. Cl. 1980), in support of its contention that MAJ Alvarez's actions, which it imputes to Supreme, violated conflict-of-interest statutes and rendered the SPV contract void. Although jurisdiction was not at issue in those cases, we discuss them because the Board has cited them in several of its decisions that it has jurisdiction over conflict-of-interest matters.

In *Mississippi Valley*, prior to award of a power plant contract, the government hired the vice president of a financial institution as its agent for negotiations and for project consulting services. The government awarded the contract to Mississippi Valley, which had retained the financial institution as its financing sponsor. The government eventually cancelled the contract because it no longer had a need for the plant and the contractor sued for breach. The government defended that the contract was unenforceable due to the agent's conflict of interest in violation of 18 U.S.C § 434, a predecessor to 18 U.S.C. § 208. The U.S. Supreme Court reversed the U.S. Court of Claims' decision in favor of the contractor. The Supreme Court considered it immaterial that there might be no actual corruption or harm to the government, and that the conflict of interest was caused or condoned by high government officials. 364 U.S. at 549-50.

The Court opined that, if the government's sole remedy was a criminal prosecution, and the Court were to enforce the contract, it would be sanctioning the type of infected bargain that the statute outlaws and that Congress's protection could be "fully accorded only if contracts which are tainted by a conflict of interest on the part of a government agent may be disaffirmed by the Government." 364 U.S. at 563. The statute did not provide for contract cancellation, but the Court held that the strong public policy it manifested, "to guarantee the integrity of the federal contracting process," and to protect the public from undetectable corruption beneath the surface of a contract conceived in a tainted transaction, required non-enforcement of the contract. *Id.* at 565-66.

In *K&R Engineering*, the contractor sued the government for breach after the government terminated one of the contractor's contracts. The contractor and the U.S. Army Corps of Engineers' chief of its St. Louis District's Plant Branch, had an

arrangement which led to the award of contracts to the contractor and profit-sharing with the chief. The chief was also involved in writing the specifications and administering the contracts. After contract termination contractor employees pled guilty to bribery and conspiracy and the chief pled guilty to a conflict of interest in violation of 18 U.S.C. § 208, due to his dealings with a firm of which he was part owner. The Court of Claims found that the undisputed facts showed that the chief had violated 18 U.S.C. § 208 in connection with the contract at issue, despite that he was never charged with a violation concerning the contractor, whose employees had been convicted in connection with other contracts. The court stated that "[n]othing in *Mississippi Valley*...indicates or even suggests that a criminal conviction is necessary before enforcement of a contract tainted by a conflict of interest may be denied." 616 F.2d at 474.

The court granted summary judgment for the government on its affirmative defense that the contract was tainted by a conflict of interest and unenforceable due to its employee's violation of 18 U.S.C. § 208(a), which the contractor did not deny, and on the government's counterclaims for amounts paid under the contract and others similarly tainted. The court denied the contractor a *quantum valebant* or *quantum meruit* recovery on the ground that it was not permissible, and would violate the thrust of the statute and public policy, when the firm seeking recovery was involved in the corruption of a government official. It added that protecting the integrity of the federal procurement process from fraudulent activities of unscrupulous contractors and dishonest government agents required a refund to the government of the sums it had paid to the contractor and non-enforcement of the contracts, which were void *ab initio*. The court stated that, consistent with the "basic principles applied in *Mississippi Valley*":

> [O]nce corruption is proven, all financial considerations, such as damage to one party or benefit to the other, are irrelevant to the government's right to disavow the contract. The same principle also requires refund of amounts paid under the tainted contracts, and the question whether the government suffered pecuniary loss from the contracts similarly is irrelevant.

616 F.2d at 477.

We address some of the Board's conflict-of-interest cases involving jurisdiction. In *United Technologies Corp.*, 95-2 BCA ¶ 27,644, we denied the contractor's motion for summary judgment on the government's affirmative defense that the contracts were void due to a conflict-of-interest violation with respect to their award. We held that we had jurisdiction to decide the merits of that defense, reasoning:

> The Federal Circuit has recognized that, implicit in Congress' grant to a board of the power to decide controversies is the power "to make all findings of fact and

> conclusions of law necessary to reach a reasoned decision." It is of no concern that a particular finding or conclusion may have some bearing on a different controversy outside the board's jurisdiction. *SMS Data products Group, Inc. v. United States,* 853 F.2d 1547, 1555, note (Fed. Cir. 1988).
>
> In this case, there is no binding judicial determination of any Section 281[21] violation on the part of the Admiral. The Navy has raised for the first time, as one of its defenses before the Board, its right to cancel the [contracts] on account of what it perceived as conflict-of-interest violations. As long as [*Mississippi Valley*], a statutory conflict-of-interest violation case, is still good law, deciding whether there were statutory conflict-of-interest violations in the appeals before us necessarily "relates" to what we have jurisdiction to decide, and what we must ultimately decide: whether the [contracts] are enforceable. Consequently, we conclude that we have jurisdiction to decide the merits of the Navy's conflict-of-interest violation defense.

Id. at 137,804.

In *SIA Construction*, 14-1 BCA ¶ 35,762, the government moved to dismiss the contractor's appeal for lack of jurisdiction on the basis that the contractor's contention, that it had been deprived of a fair opportunity to be considered for delivery orders and the government had breached its duty of good faith and fair dealing, was based upon the fraudulent activities of contracting officer technical representatives involved with delivery order award, who had pled guilty to conflict-of-interest statutory violations. The Board denied the motion to dismiss on the ground that the criminal conduct had already been established. It was not required to make any determination of fraud and could decide the contract issues before it. In fact, a violation of 18 U.S.C. § 208's conflict-of-interest prohibition does not necessarily involve fraud. *Four-Phase Systems, Inc.*, ASBCA Nos. 26794, 27487, 84-1 BCA ¶ 17,122 at 85,285, *aff'd on recon.*, 84-2 BCA ¶ 17,416 (Board denied government's motion to dismiss for lack of jurisdiction on ground Army had cancelled contract because it was tainted by conflict of interest).

The Board did not assume jurisdiction over an alleged conflict-of-interest matter in *MOQA-AQYOL JV LTD.*, ASBCA No. 57963, 13 BCA ¶ 35,285. Rather, the Board denied the government's motion to disqualify appellant's representative on the alleged

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[21] The government contended that a retired admiral had violated 18 U.S.C. § 281. The part of the statute at issue pertained to disallowing any retired officer to represent any person in the sale of anything to the government through the department in which he holds a retired status. *Id.* at 137,799.

basis that he had violated 18 U.S.C. § 207(a), which he disputed. The Board stated that, to disqualify the representative, it would have to find that he committed a crime under that statute and the government had not cited to any authority that the Board had jurisdiction to do so on contested criminal matters. Fundamentally, the jurisdictional question did not involve a dispute relative to a contract but rather procedure regarding who can represent an appellant. As we stated in *International Oil Trading*, "[t]he alleged misconduct in *MOQA* did not occur in the formation of the contract and provided no basis for finding the contract void *ab initio* under common law. Nor was there any allegation by either party that such was the case." 13 BCA ¶ 35,393 at 173,658.

In the appeals before us there has been no criminal conviction for any conflict-of-interest violation of 18 U.S.C. §§ 207(a)(1), 207(a)(2) or 208(a) by MAJ Alvarez or Supreme. The Board will not purport to adjudicate that either one committed a crime or to impose any criminal punishment or civil penalties under 18 U.S.C. § 216, which, however, as set forth above, does not preclude any common law or administrative remedy available by law to the government.

Moreover, DLA is not seeking to void or rescind the contract pursuant to 18 U.S.C. § 218. That statute pertains to "a final conviction" for conflict of interest and other violations but states that its provisions are "in addition to any other remedies provided by law." Indeed, although the conflict-of-interest statute at issue in *Mississippi Valley* did not provide for contract cancellation, the Supreme Court sanctioned a common law remedy of contract rescission, which was not dependent upon a criminal prosecution. As noted, it relied upon the strong policy of public protection against conflicts of interest. 364 U.S. at 563. *Accord International Oil Trading,* 13 BCA ¶ 35,393 at 173,658.

For the same reasons, FAR 3.704(a) and 3.705, which implement 18 U.S.C. § 218, do not apply. This includes FAR 3.705(e)'s statement that contract rescission under 18 U.S.C. § 218 and demand for recovery of amounts expended do not constitute a CDA claim and the CDA's final CO decision procedures are inapplicable. DLA does not rely upon those FAR provisions, which pertain in part to procedures whereby an agency head or designee may declare void and rescind contracts, and seek to recover amounts expended, when there has been a final conviction under 18 U.S.C. §§ 207, 208 and other statutory provisions. That is not the case here. Rather, DLA is claiming under the CDA, and defending against Supreme's claims, on the ground that the government has a common law right to disaffirm a contract when it has been tainted by a conflict of interest. Nothing in the CDA or its implementing regulations precludes such a claim or defense or prevents the Board from making findings of fact relative to the SPV contract and the alleged conflict of interest. Our focus is not upon criminality but upon determining whether there were conflict-of-interest violations that tainted the contract and rendered it void *ab initio*, as DLA contends.

Thus, the Board has jurisdiction to entertain DLA's claim and affirmative defense that the SPV contract is void *ab initio* due to conflict of interest and we deny appellant's motion to dismiss the claim for lack of jurisdiction and to strike the affirmative defense.

F. Board Jurisdiction Over First Material Breach Affirmative Defense

Supreme has also moved to dismiss DLA's first material breach affirmative defense for lack of jurisdiction on the ground that its elements are fraud-based, such as alleged false invoicing. We have jurisdiction to determine the parties' contract rights, as detailed above. This includes whether a contractor submitted false payment requests, resulting in a material breach of contract. *Environmental Systems, Inc.*, ASBCA No. 53283, 03-1 BCA ¶ 32,167, *aff'd on recon.*, 03-1 BCA ¶ 32,242.

We deny appellant's motion to dismiss DLA's first material breach affirmative defense for lack of jurisdiction and/or to strike it.

CROSS-MOTIONS FOR SUMMARY JUDGMENT

We described the bases for the parties' cross-motions for summary judgment above. We repeat or elaborate upon them here only as necessary for context.

Summary Judgment Standards

It is well established that summary judgment is appropriate only when there are no genuine issues of material fact and the movant is entitled to judgment as a matter of law. *Mingus Constructors, Inc. v. United States,* 812 F.2d 1387, 1390-91 (Fed. Cir. 1987). In deciding such a motion, we do not resolve factual disputes but determine whether there are disputes of material fact. *Free & Ben, Inc.*, ASBCA No. 56129, 09-1 BCA ¶ 34,127 at 168,742. A material fact is one that might affect the outcome of the case. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). There is a genuine issue of material fact if a reasonable fact finder could find in favor of the nonmovant. We resolve any significant doubt over fact issues, and draw all reasonable inferences, in favor of the party opposing summary judgment. *MIC/CCS, Joint Venture*, ASBCA No. 58023, 14-1 BCA ¶ 35,678 at 174,635. Cross-motions do not necessarily mean that summary judgment is appropriate. We evaluate each motion on its own merits. *Mingus*, 812 F.2d at 1391.

We examine Supreme's arguments first because, if it prevails on any or all of them, either DLA cannot succeed on its motion or the motion's scope will be reduced.

CDA's Statute of Limitations and Claim Accrual

Supreme alleges that the CDA's statute of limitations bars DLA's claims and defenses based upon false statements and misrepresentations and conflicts of interest. The CDA requires that "each claim by the Federal Government against a contractor

relating to a contract shall be submitted within 6 years after the accrual of the claim." 41 U.S.C. § 7103(a)(4)(A). Failure to meet a statute of limitations is an affirmative defense, for which the invoking party bears the burden of proof. *See* FED. R. CIV. P. 8(c); *Bridgestone/Firestone Research, Inc. v. Automobile Club de l'Ouest de la France*, 245 F.3d 1359, 1361 (Fed. Cir. 2001); *Kellogg Brown & Root Services, Inc.*, ASBCA No. 58175, 15-1 BCA ¶ 35,988 at 175,825.

FAR 33.201 defines "accrual of a claim" as:

> [T]he date when all events, that fix the alleged liability of either the Government or the contractor and permit assertion of the claim, were known or should have been known. For liability to be fixed, some injury must have occurred. However, monetary damages need not have been incurred.

Regarding when a claimed liability was "fixed," we first examine its legal basis. *Gray Personnel, Inc.*, ASBCA No. 54652, 06-2 BCA ¶ 33,378 at 165,475. The events fixing liability should have been known when they occurred unless they were concealed or inherently unknowable at that time. *Raytheon Co., Space & Airborne Systems*, ASBCA No. 57801 *et al.*, 13 BCA ¶ 35,319 at 173,376. We apply a "knew or should have known" test interchangeably with a "concealed or inherently unknowable" test, using a reasonableness analysis. *Holmes v. United States*, 657 F.3d 1303, 1317-18, 1320 (Fed. Cir. 2011) (considering Tucker Act's six-year statute of limitations, 28 U.S.C. § 2501); *Kellogg Brown & Root Services*, 15-1 BCA ¶ 35,988 at 175,825.

Statute of Limitations Inapplicable to Affirmative Defenses

The CDA's statute of limitations applies to claims. Supreme alleges, and DLA disputes, that DLA's claims and affirmative defenses based upon POT rates and conflict of interest are time-barred because the defenses are actually claims. Supreme cites to *City of St. Paul, Alaska v. Evans*, 344 F.3d 1029 (9th Cir. 2003), for the proposition that, when a party asserting a defense seeks recovery on an identical claim, its defense is not exempt from the statute of limitations. There, the City claimed that an agreement with an Alaska Native Corporation (ANC) was invalid. The ANC counterclaimed that it was valid and the City defended that it was not valid. The U.S. District Court found that the City's claims were time-barred but it could raise the same allegations as defenses to the counterclaims. The U.S. Court of Appeals for the Ninth Circuit reversed. It acknowledged that "courts generally allow defendants to raise defenses that, if raised as claims, would be time-barred," but stated that "whether affirmative defenses are exempt from statutes of limitations" depends largely upon the parties' "litigation posture." 344 F.3d at 1033, 1035. The circuit court found that the City was the aggressor; ANC's counterclaims responded to the City's claims; and the City's defenses were time-barred claims masquerading as defenses. The court acknowledged that it was influenced in its

decision to apply the statute of limitations to the City's defenses by federal statutes requiring rapid resolution of land disputes on the island of St. Paul.

The circumstances of *City of St. Paul* differ from those before us. Here, the CO unilaterally set POT pricing and Supreme appealed (ASBCA No. 57884; SOF ¶ 46). Supreme then filed monetary claims and DLA responded with affirmative defenses that the contract was void *ab initio*, seeking a monetary recovery (*e.g.*, ASBCA Nos. 58666, 59636; SOF ¶¶ 49, 51). DLA next advanced affirmative claims that also sought a monetary recovery. Thereafter, DLA withdrew the monetary component of its affirmative defenses, such that its claims and defenses at issue are no longer substantially the same. (ASBCA No. 59811; SOF ¶¶ 54, 55; tr. 85-86)

In any case, the Ninth Circuit's decision is not binding upon the Board and we have not found any Federal Circuit or board cases following it. Supreme Court and Federal Circuit precedent is to the contrary. *See United States v. Western Pacific R.R. Co.*, 352 U.S. 59, 72-73 (1956) ("To use the statute of limitations to cut off the consideration of a particular defense in the case is quite foreign to the policy of preventing the commencement of stale litigation"; government not asserting right to affirmative recovery but adjudication of questions raised by way of defense); *see similarly Beach v. Ocwen Federal Bank*, 523 U.S. 410, 416 (1998); *Board of Trustees of the Leland Stanford Junior University v. Roche Molecular Systems, Inc.*, 583 F.3d 832, 840 (Fed. Cir. 2009), *aff'd*, 563 U.S. 776 (2011).

We concluded above that DLA's affirmative defenses are not claims. Thus, while Supreme's untimeliness contentions properly can be raised in connection with DLA's claims, they do not apply to DLA's affirmative defenses.

Supreme alleges that, to be timely, DLA's claims must not have accrued before 22 January 2009, six years prior to the CO's final decision asserting them (SOF ¶ 54). Supreme bears the burden of proof on its statute of limitations and other affirmative defenses to the government's claims. We view the record in the light most favorable to the government as the nonmoving party, as we must on summary judgment. *Alion Science and Technology Corp.*, ASBCA No. 58992, 15-1 BCA ¶ 36,168 at 176,492.

Statute of Limitations Concerning DLA's Fraud in the Inducement Claim

Supreme contends that what it refers to as the "POT rate claim" is untimely. The legal basis for the claim is that Supreme fraudulently induced DLA to enter into Mods. 10 and 12 by knowingly exaggerating what its POT costs would be. Supreme alleges that the claim accrued as early as 15 June 2007 and no later than 17 June 2008. It states that, on 15 June 2007, it produced to the CO and DCAA detailed data regarding its actual costs for POT services via rotary-wing and fixed-wing aircraft from November 2005 through December 2006. On 17 June 2008, it produced additional detailed information concerning its actual aviation and ground POT costs for January through December 2007.

Supreme alleges that, even if these submissions were insufficient to put DLA on notice of the discrepancy between its estimated costs and its actual costs, DLA's POT rate claim is still untimely because it was on notice when it received DCAA's 19 December 2008 audit report. (App. mot. at 27, n.9; *see* SOF ¶¶ 32, 33)

DLA replies that Supreme's statute of limitations defense is based upon a few isolated submissions. According to DLA, the parties had agreed that DCAA would audit Supreme's actual POT costs but, as late as 29 August 2011, DCAA had documented that Supreme had not provided enough cost information to determine those actual costs and that there was an insufficient basis for negotiation (*see* SOF ¶ 37). DLA asserts that Supreme refused to cooperate in DCAA's audit and that DLA did not have sufficient knowledge to bring a POT rate claim by June 2007, June 2008, or December 2008. Moreover, DLA alleges that, during the life of the SPV contract, Supreme actively conspired to conceal its misconduct. DLA asserts that fact issues remain as to when it first possessed sufficient knowledge to file a claim pertaining to allegedly false POT rates.[22]

We agree that issues of fact remain concerning when DLA's fraud in the inducement claim pertaining to POT rates accrued. For example, in addition to the alleged issues of whether Supreme cooperated with DCAA or conspired to conceal POT cost information, there are genuine issues of material fact as to whether the POT-related costs were specifically identified in Supreme's modification proposals; whether Supreme's cost submissions to DLA and DCAA were actual or projected costs; whether the submissions were incomplete; and what was reasonably knowable by the government and when. *See Alion Science*, 15-1 BCA ¶ 36,138 (denying contractor's motion for summary judgment that government claim for penalties concerning expressly unallowable costs was time-barred; genuine issues of material fact remained regarding cost information submitted by contractor).

Therefore, we deny Supreme's motion for summary judgment or to dismiss with prejudice and to strike the POT rate claim as barred by the CDA's statute of limitations.

Statute of Limitations Concerning DLA's Conflict-of-Interest Claims

The alleged legal bases for DLA's conflict-of-interest claims are that Supreme, through MAJ Alvarez, violated: (1) 18 U.S.C. § 207(a)(1)'s "permanent restriction" against a former U.S. government employee knowingly communicating with and intending to influence current government employees, on behalf of any other person, in

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[22] DLA also contends that the statute of limitations regarding Supreme's allegedly false POT rates should be equitably tolled such that it would not commence until the *qui tam* complaint was unsealed in December 2014 (*see* SOF ¶ 52) or at least until the commencement of discovery in this litigation. Due to our disposition of Supreme's statute of limitations argument on other grounds, we do not reach the equitable tolling question.

connection with a "particular matter," in which the United States had a direct and substantial interest, the former employee had substantially participated when he was a government employee, and which involved a specific party or parties at the time of such participation; (2) 18 U.S.C. § 207(a)(2)'s two-year "responsibility" restriction against such a former government employee, within two years after termination of his employment, knowingly communicating with and intending to influence current government employees, on behalf of any other person, in connection with a "particular matter" in which the United States has a direct and substantial interest, which the former employee knew or reasonably should have known was actually pending under his official responsibility within one year before termination of his government employment, and which involved a specific party or parties at the time it was pending; and (3) 18 U.S.C. § 208(a)'s "personal financial interest" restriction against a U.S. government employee participating personally and substantially, including through the rendering of advice, in a contract or other particular matter in which, to his knowledge, he, or any person or organization with which he is negotiating or has any arrangement concerning prospective employment, has a financial interest.

Supreme alleges that DLA, including CO DiMeo, knew or reasonably should have known, of the circumstances of MAJ Alvarez's employment by DLA Troop Support, his employment by Supreme, and his work for Supreme in connection with the SPV contract, long before DLA's alleged 22 January 2009 claim accrual measuring point. Now that DLA has withdrawn its conflict-of-interest allegations against other government personnel (*see* n. 18), it says little in response to Supreme's motion that its conflict-of- interest claims are time-barred, other than to state that MAJ Alvarez worked for Supreme after January 2009 and continued to focus upon developing business with DLA. DLA does not show why this should extend the accrual date of its conflict-of-interest claims.

Although the record is not yet complete in this regard, DLA is charged with knowledge of MAJ Alvarez's employment circumstances while he was at DLA and his involvement with SPV contract matters. He was identified in 2002 as "Chief, Food Service Business Unit, [DSCP], European Region" and in 2003 as "Chief, Subsistence, DSCPE." From 2002 through March 2004, he authored or was copied on several internal DLA emails concerning subsistence support in Afghanistan, some of which involved Supreme's potential capabilities. CO DiMeo and her supervisor, Mr. Shifton, were copied on at least four of the emails. (SOF ¶ 4) Although the SPV contract was awarded and administered by DSCP, DLA's facilities in Philadelphia, Pennsylvania (*e.g.*, SOF ¶¶ 1, 16), and MAJ Alvarez worked at a DLA office in Europe, CO DiMeo declared that she generally recalled that he was involved in acquisition planning for the SPV contract while a DLA employee and that he served as a CO, working on matters pertaining to DLA's SPV programs. She also testified in her deposition, regarding Mod. 10, effective in August 2006, about MAJ Alvarez's employment at DLA prior to his working for Supreme and his operational knowledge being much greater than her own. (SOF ¶¶ 25, 26)

DLA knew, by 23 March 2004, when MAJ Alvarez stated he so advised Mr. Shifton, and at least by April 2004, when he gave the CO and others at DLA written notice of his new contact information, that MAJ Alvarez was joining Supreme (SOF ¶¶ 6, 8). He signed Supreme's 16 November 2004 SPV contract proposal (SOF ¶ 11). In February 2005 DLA personnel questioned his attendance at a DLA meeting and the CO assessed the situation (SOF ¶ 14). DLA awarded the contract to Supreme on 3 June 2005. MAJ Alvarez signed Mod. 12 on behalf of Supreme on 10 October 2006. It is undisputed that, after leading Supreme's proposal on the SPV solicitation, he became involved in many of the most important and high-dollar aspects of the SPV contract modifications, negotiations, and performance. (SOF ¶¶ 15, 16, 27)

Thus, DLA knew, or reasonably should have known, that it had a potential conflict-of-interest claim involving MAJ Alvarez and Supreme as early as 23 March 2004 and no later than 10 October 2006. Even using the latter date, DLA had to assert its claim within six years thereafter, by 10 October 2012. It did not do so until 22 January 2015 (SOF ¶ 54), over two years late.

Accordingly, DLA's conflict-of-interest claims under 18 U.S.C. §§ 207(a)(1), 207(a)(2), and 208(a) are barred by the CDA's statute of limitations and we dismiss them with prejudice.

Release of DLA's Fraud in the Inducement Claims Pertaining to JAFCO

Supreme alleges that its settlement with the government of the *qui tam* action against it unambiguously released it from any civil or administrative monetary claim for the Covered Conduct as it applies to covered JAFCO matters (tr. 71). DLA disputes that the settlement agreement released Supreme from any aspect of DLA's 22 January 2015 claim or from any of its affirmative defenses. DLA contends that, even if the Board were to hold that the settlement applies to its claim, the Covered Conduct is only one of multiple independent bases for the CO's conclusion that the contract was void *ab initio* or, alternatively, that Supreme committed the first material breach.

A settlement agreement is a contract, which we interpret as a matter of law. *Slattery v. Department of Justice*, 590 F.3d 1345, 1347 (Fed. Cir. 2010); *Musick v. Department of Energy*, 339 F.3d 1365, 1369 (Fed. Cir. 2003); *United Pacific Insurance Co.*, ASBCA No. 52419 *et al.*, 04-1 BCA ¶ 32,494 at 160,746, *aff'd, United Pacific Insurance Co. v. Roche,* 401 F.3d 1362 (Fed. Cir. 2005). In a release, which is contractual in nature, a party abandons a claim or relinquishes a right that it could assert against another. *Holland v. United States*, 621 F.3d 1366, 1377 (Fed. Cir. 2010), *cert. denied*, 123 S. Ct. 365 (2011). A release "is interpreted in the same manner as any other contract term or provision," *Bell BCI Co. v. United States*, 570 F.3d 1337, 1341 (Fed. Cir. 2009), which is to say that it is interpreted as a whole, to harmonize and give a reasonable meaning to all of its parts. *See NVT Technologies, Inc. v. United States*, 370 F.3d 1153, 1159 (Fed. Cir. 2004). If a release's terms are clear and unambiguous, we are to give

them their plain and ordinary meaning, without resort to extrinsic evidence. *Bell BCI*, 570 F.3d at 1341. An unambiguous release in a settlement agreement can be amenable to summary judgment. *Augustine Medical, Inc. v. Progressive Dynamics, Inc.*, 194 F.3d 1367, 1374 (Fed. Cir. 1999) (affirming U.S. District Court's grant of summary judgment based upon settlement and release); *Colorado River Materials, Inc.*, ASBCA No. 57751, 13 BCA ¶ 35,233 (granting summary judgment to government based upon settlement agreement's release and accord and satisfaction).

The 8 December 2014 agreement settling the FCA *qui tam* action against Supreme and others is set forth above in pertinent part (SOF ¶ 52). In paragraph 4 of the agreement's terms and conditions, subject to exceptions in paragraph 6, addressed below, that do not apply to "Covered Conduct" claims, the United States released Supreme "from any civil or administrative *monetary claim* the United States has for the Covered Conduct [emphasis added]" under the FCA, the CDA or common law theories of contract breach, payment by mistake, unjust enrichment and fraud (*id.*). The "Covered Conduct," described at paragraph D of the agreement's recitals, includes charging the government more than the price actually invoiced to JAFCO by LMR manufacturers and suppliers; charging it more for bottled water than vendors invoiced to Supreme; and failing to disclose or pass through to the government discounts and rebates (*id.*). We conclude that the settlement agreement unambiguously released Supreme from any civil or administrative government monetary claims for the Covered Conduct.

Despite this release, in her 22 January 2015 final decision, the CO included the Covered Conduct as the second of five bases for the government's claims that the contract was void *ab initio* and that Supreme owed it $8,231,152,631.09. The CO alleged that Supreme had pled guilty to "major fraud" against the United States by using JAFCO as a middleman to inflate the price of LMR items; inflating the price of bottled water, again using JAFCO as an intermediary; and Supreme had failed to pass on discounts to DLA as required under the contract. (SOF ¶ 54)

Because the settlement agreement unambiguously released Supreme from any government monetary claim for the Covered Conduct as it applies to JAFCO matters, this aspect of the CO's final decision asserting the government's claims is barred. We grant summary judgment to Supreme on this issue.

Although the Covered Conduct-based claims pertaining to JAFCO and conflict-of-interest claims are barred, other alleged bases for the CO's claims remain for disposition, that is, the SPV contract is tainted and void *ab initio* because: Supreme made material misrepresentations regarding its proposed POT rates, purported costs and profits, and its willingness to cooperate with a DCAA audit, and it fraudulently induced DLA to enter into Mods. 10 and 12; Supreme overcharged for POT based upon inflated net product weights; and, through a partnership with PWC and PCA, Supreme made material misrepresentations regarding its market-basket pricing and it failed to report its inflated pricing after it became aware of PWC's major fraud. (SOF ¶ 54)

DLA's Fraud in the Inducement Affirmative Defenses
Pertaining to JAFCO Are Not Released

DLA did not release its affirmative defenses. In paragraph 6 of the settlement agreement's terms and conditions, the United States specifically reserved, and did not release, among other things:

> (d) Any liability to the United States (or its agencies) for *any conduct other than the Covered Conduct*, including for the claims and affirmative defenses of the United States set forth in [the subject litigation before the Board, and any other administrative contract claims with respect to the [SPV contract] that the United States has asserted, could have asserted, or may assert in the future against Supreme under the [CDA].... [Emphasis added]

(SOF ¶ 52) In paragraph 7, the United States excepted its affirmative defenses from its releases, including in connection with the Covered Conduct:

> 7. *Nothing in this agreement, including the releases in Paragraphs 4* and 5, *shall preclude the United States from asserting any affirmative defense for any conduct, including the Covered Conduct*, with respect to [the SPV contract] that the United States has asserted, could have asserted, or may assert in the future against Supreme in any and all appeals of Supreme filed before the [ASBCA].... [Emphasis added]

(*Id.*) When paragraphs 6 and 7 are read together and harmonized, it is clear that the settlement agreement did not release the government's affirmative defenses, including in connection with the Covered Conduct.

Therefore, we deny appellant's motion for summary judgment that the government released its affirmative defenses concerning the Covered Conduct and JAFCO.

Supreme's Waiver Defense

Supreme contends that, even if DLA's fraud in the inducement claims[23] were established by undisputed facts, the SPV contract would be voidable, not void *ab initio*, because DLA has not shown a causal link between the misconduct and contract award or DLA's decision to add POT. Supreme asserts that DLA waived any option to avoid the

[23] Supreme also included DLA's conflict of interest claims in its waiver defense, but we found that they are time-barred and we do not address them further here.

contract, or to claim first material breach, by repeatedly reaffirming the contract's validity notwithstanding DLA's knowledge of Supreme's misconduct. DLA responds that, because the contract was void *ab initio*, waiver cannot apply. It contends that a contract is voidable if it is illegal due to no fault of the contractor or the illegality is not directly connected to the contract (*e.g.*, statutory procedural errors during procurement) and that is not the case here. DLA asserts that, even if the contract were voidable, it did not waive its right to declare it void. DLA disputes Supreme's alleged facts concerning waiver and asserts that waiver is a matter of intention, inherently fact-ridden, and inappropriate for summary judgment.

Waiver is a "*voluntary* and intentional relinquishment of a known right." *Cherokee Nation v. United States*, 355 F.2d 945, 950 (Ct. Cl. 1966). A party to a contract may waive the other party's breach by continuing to accept the breaching party's performance without reservation of rights. The breaching party bears the burden to prove waiver. Conduct or actions that mislead the breaching party into reasonably believing that the rights to a claim arising from the breach were waived can result in an implied waiver. *Westfed Holdings, Inc. v. United States*, 407 F.3d 1352, 1360-61 (Fed. Cir. 2005).

A right to cancel a contract for breach must be exercised with reasonable promptness after discovery of the breach. *Cities Service Helex, Inc. v. United States*, 543 F.2d 1306, 1315 (Ct. Cl. 1976); *see Barron Bancshares, Inc. v. United States*, 366 F.3d 1360, 1380-83 (Fed. Cir. 2004) (government waived claim for prior material breach by continuing to perform contract). However, continuing with a contract is not necessarily conclusive of waiver. Whether waiver has occurred involves a more complex inquiry than merely ascertaining whether performance continued. An examination must be made of whether, in the circumstances of the particular case, the contracting party whose obligation to perform had been discharged by breach exercised reasonable commercial judgment in continuing to perform. An election to continue with a contract might be an indispensable course of action which was the only practicable one. *Northern Helex Co. v. United States*, 455 F.2d 546, 553-54 (Ct. Cl. 1972).

Similarly to Supreme, the contractor in *C&D Construction* alleged that the government had waived its right to contend that the contract was void by allowing the contractor to continue performance, which it relied upon to its detriment, even though the government was aware of an ongoing criminal investigation. The contractor argued that, if the Board did not find waiver, the government would be unjustly enriched by unpaid work performed. In denying waiver, the Board stated that the strongest evidence of the contractor's misrepresentation came with a guilty plea after performance completion and the Board could not ascertain at what point, if any, performance suspension might have been appropriate. 90-3 BCA ¶ 23,256 at 116,684. It also noted that in *K&R Engineering*, 616 F.2d 469, the Court of Claims had rejected recovery on the bases of *quantum valebant* or *quantum meruit* when the company seeking recovery was involved in the wrongdoing from which the voiding of the contract had resulted. *Id.*

In these appeals, genuine issues of material fact preclude summary judgment for Supreme on its waiver defense, including whether Supreme's alleged wrongdoing tainted the SPV contract and rendered it void *ab initio*, such that waiver arguably does not apply, or whether it was instead voidable. *See* RESTATEMENT (SECOND) OF CONTRACTS, § 163, cmt. c., quoted below; *see also Godley v. United States*, 5 F.3d 1473, 1476 (Fed. Cir. 1993) (reversing trial court's summary judgment that contract was voidable rather than void *ab initio* and noting "[d]etermining whether illegality taints a contract involves questions of fact"). If the contract were voidable, material fact questions regarding waiver remain, such as what DLA knew of Supreme's alleged wrongdoings, when it knew, what DLA's intentions were in continuing with the contract and what its reasonable options were at the times it learned of Supreme's alleged breaches.

Accordingly, we deny Supreme's motion for summary judgment or to dismiss with prejudice and strike DLA's fraud in the inducement and first material breach claims due to waiver.

Supreme's Accord and Satisfaction Defense

Supreme alleges that, in resolving JAFCO matters, it paid over $430 million in fines, restitution and forfeiture payments and that, to the extent that DLA's claims are based upon the Covered Conduct and the criminal plea and civil settlement agreements, they are barred by the doctrine of accord and satisfaction. This defense, like Supreme's release defense, applies only to the JAFCO Covered Conduct (tr. 71-72). DLA disclaims accord and satisfaction on the grounds that it is not seeking a duplicate monetary recovery and its claims and defenses pertain to more than the JAFCO Covered Conduct.

The affirmative defense of accord and satisfaction applies when a performance different from that claimed as due is rendered and is accepted by the claimant in full satisfaction of its claim. Supreme bears the burden to show proper subject matter, competent parties, a meeting of the minds, and consideration. *Bell BCI*, 570 F.3d at 1340-41. Although accord and satisfaction is a separate defense from release, an agreement can constitute both a release and an accord and satisfaction, either of which may bar future claims. *Holland*, 621 F.3d at 1377; *Optex Systems, Inc.*, ASBCA No. 58220, 14-1 BCA ¶ 35,801 at 175,097.

We granted summary judgment to Supreme that the settlement agreement released it from any government monetary claim for the JAFCO Covered Conduct. Accordingly, we deny as moot Supreme's motion for summary judgment on its accord and satisfaction affirmative defense insofar as it pertains to DLA's monetary JAFCO claims.

In its accord and satisfaction defense Supreme raises its guilty plea agreement that its payments represented a "fair and just resolution of all issues associated with loss, fine, and forfeiture calculations" (SOF ¶ 53). However, this provision appears to be intended

to pertain to the criminal proceedings and associated statutes.[24] Supreme and a related entity paid $288.36 million under the 22 September 2014 guilty plea agreement, but it is evident that this was not in accord and satisfaction of all amounts the government claimed from Supreme for its alleged misconduct (*id.*). Later, on or about 3 October 2014, Supreme paid DLA $38,362,198.71 for a "WATER TRUE UP" and, on 8 December 2014, as part of the settlement of the civil *qui tam* action, Supreme paid $101 million to the United States (SOF ¶ 52).

We deny Supreme's motion for summary judgment or to dismiss and strike DLA's claims of fraud in the inducement and first material breach based upon the doctrine of accord and satisfaction.

We turn next to DLA's motion for partial summary judgment, covering its affirmative defenses of fraud in the inducement, conflict of interest, and first material breach. We have addressed several of the parties' contentions in connection with Supreme's motion for summary judgment or to dismiss DLA's affirmative claims and we repeat them only briefly in the context of DLA's dispositive motion on its defenses.

DLA's Affirmative Defense of Fraud in the Inducement

DLA contends that Supreme fraudulently induced it to enter into Mods. 10 and 12, which tainted the entire SPV contract. It alleges that Supreme made knowingly false statements regarding its expected costs and profit and its JAFCO relationship; the CO would not have executed Mod. 10 as written had she known the truth; and the contract and its POT provisions are void *ab initio* even though the inducement mainly involved Mods. 10 and 12 and not the initial decision to obtain POT performance. Supreme responds that summary judgment for DLA is not proper due to genuine disputes of material fact and, as a matter of law, DLA has not contended that Supreme's alleged misrepresentations induced contract award. Supreme again contends that, even if true, DLA's allegations would render the contract voidable, not void *ab initio*.

The "general rule is that a Government contract tainted by fraud or wrongdoing is void *ab initio*." *Godley*, 5 F.3d at 1476; *accord Long Island Savings Bank, FSB v. United States*, 503 F.3d 1234, 1245 (Fed. Cir. 2007), *cert. denied*, 129 S. Ct. 38 (2008); *see Dongbuk*, 13 BCA ¶ 35,389 at 173,637 ("It is well established that when one party to a contract induces the other party to enter into an agreement through fraud or misrepresentation, the contract is void *ab initio*."). To prove that a contract is tainted from its inception by fraud and void *ab initio*, the government must show that the contractor obtained the contract by knowingly making a false statement. *Long Island Savings Bank*, 503 F.3d at 1246. For the void *ab initio* rule to apply, there must be a causal link between the alleged illegality and the contract provisions. *Godley*, 5 F.3d

[24] *See, e.g.*, 18 U.S.C. § 3571 covering fines, including fines based upon gain or loss.

at 1476; *see also Kellogg Brown & Root Services, Inc. v. United States*, 728 F.3d 1348, 1371 (Fed. Cir. 2013), *cert. denied*, 135 S. Ct. 167 (2014) (when government alleges common law fraud, it "must be a but-for cause of the outcome").

In *Long Island Savings Bank*, the Federal Circuit determined that federal common law governed and a misrepresentation could prevent a contract's formation or make it voidable, citing to the following sections of the RESTATEMENT (SECOND) OF CONTRACTS:

> **§ 7. Voidable Contracts**
>
> **A voidable contract is one where one or more parties have the power, by a manifestation of election to do so, to avoid the legal relations created by the contract, or by ratification of the contract to extinguish the power of avoidance.**
>
> **Comment:**
>
> a. "*Void contracts.*" A promise for breach of which the law neither gives a remedy nor otherwise recognizes a duty of performance by the promisor is often called a void contract. Under § 1, however, such a promise is not a contract at all; it is the "promise" or "agreement" that is void of legal effect.
>
> **§ 163. When a Misrepresentation Prevents Formation of a Contract**
>
> **If a misrepresentation as to the character or essential terms of a proposed contract induces conduct that appears to be a manifestation of assent by one who neither knows nor has reasonable opportunity to know of the character or essential terms of the proposed contract, his conduct is not effective as a manifestation of assent.**
>
> **Comment:**
>
> ....
>
> c. "*Void*" *rather than voidable.* It is sometimes loosely said that, where the rule stated in this Section applies, there is a "void contract" as distinguished from a voidable one. See Comment a to § 7. This distinction has important consequences. For example, the recipient of a

misrepresentation may be held to have ratified the contract if it is voidable but not if it is "void."

§ 164. When a Misrepresentation Makes a Contract Voidable

(1) If a party's manifestation of assent is induced by either a fraudulent or material misrepresentation by the other party upon which the recipient is justified in relying, the contract is voidable by the recipient.

Additionally, section 167 of the RESTATEMENT addresses fraud in the inducement:

§ 167. When a Misrepresentation Is an Inducing Cause

A misrepresentation induces a party's manifestation of assent if it substantially contributes to his decision to manifest his assent.

Comment:

a. *Scope*. The rule stated in this Section determines whether a misrepresentation in fact induced a party's actual or apparent manifestation of assent.... A misrepresentation is not a cause of a party's making a contract unless he relied on the misrepresentation in manifesting his assent.... It is not necessary that this reliance have been the sole or even the predominant factor in influencing his conduct. It is not even necessary that he would not have acted as he did had he not relied on the assertion. It is enough that the manifestation substantially contributed to his decision to make the contract. It is, therefore, immaterial that he may also have been influenced by other considerations.

In *C&D Construction*, the government asserted that the appellant's claims should be denied because the contract was void as having been obtained by fraudulent means. The Board stated that a contract is void or voidable when its award resulted from misrepresentations in the contractor's bid. It addressed the elements of fraud in the inducement as follows in part:

> [C]ommon law fraud includes the situation where (1) a false representation is made with knowledge that the representation is false, (2) the misrepresentation is made with the intent to induce action in reliance upon the misrepresentation, (3) the

> injured party justifiably relies upon the misrepresentation, and (4) the injured party is damaged as a result of its reliance. Reliance exists where the false representation plays a material and substantial part in leading the injured party to act; it is not necessary that the misrepresentation be the exclusive, or even the paramount, inducement to act. [Citations omitted]

90-3 BCA ¶ 23,256 at 116,683.[25] In concluding that the contract was void and the appellant was not entitled to recover on its claims, the Board relied in part upon RESTATEMENT §§ 164 and 167.

As noted, determining whether illegality taints a contract involves questions of fact. *Godley*, 5 F.3d at 1476. Genuine issues of material fact, discussed below, preclude summary judgment for DLA on its fraud in the inducement affirmative defense.

DLA'S Affirmative Defense of Conflict of Interest

While we concluded that DLA's conflict-of-interest claims are time-barred, its affirmative conflict-of-interest defense remains. DLA contends that the SPV contract is void *ab initio* due to alleged conflicts of interest by MAJ Alvarez in violation of 18 U.S.C. §§ 207(a)(1), (a)(2), and 208(a), citing, *inter alia*, to *Mississippi Valley, K&R Engineering*, and *United Technologies* in support. Supreme responds that:

> [T]here is a genuine dispute as to virtually every material fact underlying DLA's conflict of interest allegations, including most notably: (i) whether Mr. Alvarez participated in the same "particular matter" at both DLA and Supreme; (ii) whether Mr. Alvarez participated "personally and substantially" in a particular matter while employed by DLA that he later worked on for Supreme; (iii) whether the SPV Contract was under Mr. Alvarez's "official responsibility" at DLA; and (iv) whether Mr. Alvarez had a "financial interest" in any matter he worked on while at DLA.

(App. opp'n at 29)

Genuine issues of material fact preclude summary judgment for DLA on its conflict-of-interest affirmative defense, as we discuss further below.

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[25] The Board also stated that it was not necessary that a "but-for" test be satisfied, but this was before the Federal Circuit's 1993 decision in *Godley*.

DLA's Affirmative Defense of First Material Breach

DLA also seeks summary judgment on its affirmative defense that Supreme committed the first material breach, releasing the government from its contract obligations, including any further payments to Supreme. DLA's allegations concerning first material breach shift somewhat. In its answer to the complaint in ASBCA No. 57884, DLA contended that it was not required to pay Supreme under the contract for five reasons: it overcharged the government by inflating the net product weight of goods delivered; it overcharged for bottled water; it did not timely disclose evidence of a violation of Federal criminal law, including stemming from its relationship with PWC; it did not pass on early-payment discounts to the government; and it did not cooperate in good faith with DCAA's audit (SOF ¶ 56).

In its summary judgment motion, DLA alleges:

> Supreme's "major" JAFCO fraud, repeated and undisclosed overbilling, and systematic lack of fair dealing throughout the life of the contract constituted the first material breach, which excuses DLA's obligation to make any further payments.

(Gov't mot. at 55) It also discusses five alleged ways in which Supreme breached the SPV contract: it misrepresented costs and profit; it did not cooperate in good faith with DCAA; it submitted knowingly false POT invoices; as set forth in DOJ's criminal information, it overcharged the government through JAFCO and deliberately concealed its relationship with JAFCO; and it repeatedly violated conflict-of-interest statutes through MAJ Alvarez's conduct. DLA asserts that each of its examples constitutes a material breach but the Board should not evaluate them in isolation or balance them against contract work that was "free of fraud" (Gov't mot. at 59).

DLA adds in its opposition and reply to Supreme's motion that, even if MAJ Alvarez's conflict-of-interest violations cannot be established on summary judgment, Supreme still materially breached the contract by failing timely to disclose credible evidence of his violations. DLA alleges that disclosure is part of good faith and integrity principles inherent in the SPV contract from inception, citing *Laguna Construction Co.*, ASBCA No. 58324, 14-1 BCA ¶ 35,748 at 174,948 (appeal pending, U.S. Court of Appeals for the Federal Circuit, No. 2015-1291).

In *Long Island Savings Bank* the Federal Circuit found that, even if the contract at issue were not void, the plaintiffs' breach of contract claim for damages would be precluded by the doctrine of prior material breach. 503 F.3d at 1251. It cited to *Barron Bancshares*, where the court described the doctrine as follows:

> [W]hen a party to a contract is sued for breach, it may defend on the ground that there existed a legal excuse for its nonperformance at the time of the alleged breach. Faced with two parties to a contract, each of whom claims breach by the other, courts will "often...impose liability on the party that committed the first material breach."

366 F.3d at 1380. The court in *Long Island Savings Bank* noted that, in both *Barron Bancshares*, *id.* at 1380-81, and in *Christopher Village, L.P. v. United States*, 360 F.3d 1319, 1334 (Fed. Cir. 2004), the court had referred to § 237, cmt. b. of the RESTATEMENT (SECOND) OF CONTRACTS, which states that the prior material breach rule:

> [I]s based on the principle that where performances are to be exchanged under an exchange of promises, each party is entitled to the assurance that he will not be called upon to perform his remaining duties of performance with respect to the expected exchange if there has already been an uncured material failure of performance by the other party.

Citing to RESTATEMENT § 235, the court further stated in *Long Island Savings Bank* that the knowledge element required under federal common law fraud to make a contract void is not required for prior material breach. It is not necessary to show willfulness, negligence or fault. 503 F.3d at 1252 n.4; *see also Laguna*, 14-1 BCA ¶ 35,748 at 174,948-949 (contractor's personnel pled guilty to taking kickbacks, causing inflation of invoices to government; Board granted summary judgment to government that contractor breached duty of good faith and fair dealing through criminal actions of its personnel, imputed to contractor, and committed first material breach, excusing government from paying invoices; no requirement to balance fraudulent acts and work free of fraud).

Supreme alleges that "there is a genuine dispute regarding every material fact underlying DLA's breach claims" (app. opp'n at 59). We agree that there are material facts in dispute. For example, although Supreme settled certain JAFCO matters with the government, paid a water "TRUE UP" to the government, and pled guilty regarding certain JAFCO-related violations (SOF ¶¶ 52, 53), the scope of, and facts underlying, the settlement and plea are not yet fully explicated in the record. Moreover, bilateral Mod. 92 covered pricing by Supreme, discounts, JAFCO, and cooperation by Supreme with the government (SOF ¶ 44). DLA continued with the contract thereafter. The facts of record are insufficient to establish whether this constituted a waiver by DLA or an accord and satisfaction of its first material breach claim. Additionally, DLA has asked us to consider all elements of its first material breach defense together. We address below factual issues concerning components of this defense that apply to other of DLA's affirmative defenses.

In sum, genuine issues of material fact preclude summary judgment for DLA on its first material breach affirmative defense.

GENUINE ISSUES OF MATERIAL FACT BAR THE GOVERNMENT'S MOTION FOR PARTIAL SUMMARY JUDGMENT

Supreme claimed in oral argument that the record and its statement of genuine issues show that "every single material fact here is disputed" (tr. 25). In addition to the material factual disputes identified by Supreme in connection with the government's conflict of interest defense involving MAJ Alvarez, quoted above, there are numerous material fact issues that bar summary judgment for the government on its affirmative defenses at issue, including but not limited to: whether Supreme's alleged misconduct was the "but/for" cause of DLA's entering into the SPV contract and/or Mods. 10 and 12; what DLA relied upon in awarding Supreme the contract and entering into those modifications; the proper analysis of Supreme's cost and pricing spreadsheets and related materials; the process, context and basis of submissions by MAJ Alvarez and others, by or on behalf of Supreme (or PWC), during POT rate negotiations; whether DLA understood that Supreme's cost methodology in its submissions was based upon projected costs rather than actual costs; the nature and import of Supreme's certifications; whether Supreme deliberately promoted false invoicing; the intended contract interpretation of "net product weight"; whether DLA was aware during contract performance of Supreme's method of computing "net product weight"; and whether Supreme's invoices based upon its calculation of "net product weight" were misrepresentations.

DECISION

For the above reasons, we grant appellant's motion to dismiss with prejudice DLA's conflict-of-interest claims as time-barred by the CDA's six-year statute of limitations; we grant appellant's motion for summary judgment on its affirmative defense of release as it pertains to the Covered Conduct JAFCO-related claims; and we otherwise deny appellant's motions. We deny the government's motion for partial summary judgment on its affirmative defenses.

Dated: 17 March 2016

CHERYL L. SCOTT
Administrative Judge
Armed Services Board
of Contract Appeals

(Signatures continued)

I concur

MARK N. STEMPLER
Administrative Judge
Acting Chairman
Armed Services Board
of Contract Appeals

I concur

RICHARD SHACKLEFORD
Administrative Judge
Vice Chairman
Armed Services Board
of Contract Appeals

I certify that the foregoing is a true copy of the Opinion and Decision of the Armed Services Board of Contract Appeals in ASBCA Nos. 57884, 58666, 58958, 58959, 58982, 59038, 59164, 59165, 59391, 59392, 59393, 59418, 59419, 59420, 59481, 59615, 59618, 59619, 59636, 59653, 59675. 59676, 59681, 59682, 59683, 59811, 59830, 59863, 59867, 59872, 59879, 60017, 60024, 60250, 60309, 60365, Appeals of Supreme Foodservice GmbH, rendered in conformance with the Board's Charter.

Dated:

JEFFREY D. GARDIN
Recorder, Armed Services
Board of Contract Appeals