



it has jurisdiction over this Dispute. 49 U.S.C. § 40110(d)(4) (2012). Additionally, the final agency decision in this matter will be issued by the ODRA Director since the amount claimed by NBI is within the ODRA Director's delegated decisional authority.<sup>1</sup>

The ODRA reviews AMS contract disputes *de novo*, and the burden of proof in this matter rests on NBI as the party seeking relief to prove its case by a preponderance of the evidence. 5 U.S.C. § 556(d) (2012); *see also*, 14 C.F.R. §17.33(m)(2014); *Zullo Building Maintenance, LLC*, 13-ODRA-00676. Neither party requested a hearing under the ODRA Procedural Regulations at 14 C.F.R. § 17.33(k). The record closed on December 2, 2014, following receipt of the parties' final submissions.

## **II. Discussion**

The amount in controversy relates specifically to bathroom refurbishing work performed by NBI under the Contract. The Contract's SOW provided for the refurbishment of three bathrooms in the existing ATCT and administrative base building, namely, three bathrooms at the ground level of the base building and one bathroom at the junction level of the ATCT. *AR* Tab 2 at 18. The items to be refurbished included, but were not limited to, demolishing and removing "all existing materials at three bathrooms to existing wall studs, ceiling joists, and floor slab" and furnishing and installing "new floor and wall tile in three bathrooms." *Id.* The SOW further required the contractor to "match existing floor and wall tile in adjacent shower rooms" and "provide three color samples for selection and approval." *Id.* The specific cost items that comprise NBI's claim include the costs of cleaning, and then replacing the ceramic floor tile, as well as the costs of increased labor hours, mobilization, travel, lodging and delay that resulted from the impact of those activities. *AR* Tab 19.

The Contracting Officer ("CO") issued a notice to proceed ("NTP") with the contract work to NBI on October 2, 2012. *AR* Tab 3. NBI commenced contract performance on October 25, 2012. *Id.* The NTP provided for work to be completed by April 22, 2013. *Id.* On February 27, 2013, the FAA Service Area provided NBI with a punch list of outstanding work items in need

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<sup>1</sup> *Delegation of Authority*, 79 Fed. Reg. 21,832 (April 17, 2014).

of completion. *AR Tab 7; NBI Response* at 2 (incorporating AR Statement of Proposed Facts as to dates and times of events). The outstanding work items identified in the punch list of that date included: “remove and replace floor tile” in the base building and ATCT restrooms. *AR Tab 7*. Approximately one month later, on March 26, 2013, the Contracting Officer’s Representative (“COR”) provided NBI with an updated punch list for completion. *AR Tab 12*. The updated punch list reflected no progress on the replacement of the ceramic floor tile. *Id.* The updated punch list for completion was followed by an email, dated April 16, 2013, from the CO, reiterating the need for NBI to complete punch list “Item #012 – All 3 restrooms, remove and replace floor tile, ref. sow.” *Id.* The CO’s April 16th email also advised NBI that it was “imperative” that the item “be corrected immediately so as to not delay the completion of this project.” *Id.* The CO further directed NBI “to proceed with the required work in accordance with the contract.” *Id.* The record shows that NBI completed the tile work in the bathrooms on or about June 13, 2013 and submitted its final invoice to the FAA Service Area on June 19, 2013. *AR Tab 19*.

#### **A. Ceramic Floor Tile Replacement Claim**

NBI asserts that the CO’s directive to remove and replace the ceramic floor tile constituted a compensable change to the Contract’s SOW, causing NBI to incur additional costs of performance. *NBI Response* at 3; *AR Tab 19* at 1-4, 13-14. NBI argues that the Contract did not contemplate the performance of this work. NBI cites to oral representations of contracting officials during a pre-bid conference conducted on May 3, 2012, and a subsequent amendment of the Solicitation issued on May 22, 2012, in support of its position that replacement of the ceramic floor tile in the three bathrooms had been removed from the SOW. *Id.*

The record shows that, following the pre-bid conference, the FAA Service Area issued Amendment 1 to the Solicitation. *AR Tab 2* at 9-12. Amendment 1 addressed an apparent difference between the actual site conditions and the SOW, which had called for the demolition and removal of all materials to “existing wall studs” and the installation of new wall tile in all three bathrooms. *Id.* The participants in the pre-bid conference had observed that the walls in the administrative base building bathrooms were covered with ceramic glazed masonry units

("CMUs"), and in fact, were not stud walls as represented in the SOW language. *Id.* In response, Amendment 1 removed the SOW requirement for replacing the ceramic tile on the *walls* in the administrative base building that were covered with CMU. The SOW's existing requirement for removal and installation of new ceramic tiles on the *floors* of all three bathrooms was unchanged. *Id.*

Based on the plain language of the Contract, the ODRA finds that the CO's directives to remove and replace the bathroom floor tile did not constitute a change to the SOW. *AR* Tabs 12 and 13. In so finding, the ODRA gives the language of the Contract "that meaning that would be derived ... by a reasonably intelligent person acquainted with the contemporaneous circumstances." *Partnership for Response & Recovery, LLP v. Department of Homeland Security*, CBCA No. 3566, 14-1 BCA ¶35,629, citing *TEG-Paradigm Environmental, Inc. v. United States*, 465 F.3d 1329, 1338 (Fed. Cir. 2006).<sup>2</sup> "When the contract's language is unambiguous, it must be given its 'plain and ordinary' meaning." *Id.* Here, the language of the SOW plainly states the requirement to "[f]urnish and install new floor and wall tile in three bathrooms." *AR* Tab 2 at 16.<sup>3</sup> While Amendment 1 of the Solicitation changed the requirement for ceramic tile with respect to the administrative base building bathroom *walls*, the ODRA finds that a reasonably intelligent person would not view Amendment One as changing the requirement to replace the ceramic tile on the bathroom *floors*. *AR* Tab 2 at 10.

Additionally, the unambiguous plain language of the SOW is at odds with the interpretation put forth by NBI. NBI's interpretation that Amendment 1 deleted the requirement to replace ceramic floor tile in all the bathrooms would create a patent ambiguity. Other language in the Contract expressly contemplated the replacement of ceramic tile on the floors. Such a patent ambiguity

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<sup>2</sup> The ODRA is not bound to follow the decisions of the boards of contract appeals, but may look to their decisions as persuasive when the underlying contract issues are analogous to contracting under the AMS. *Zullo Building Maintenance, LLC*, 13-ODRA-00676.

<sup>3</sup> In support of its claim, NBI submitted for the record a copy of what appears to be handwritten notes from the pre-bid conference, which reflect the alleged change to the SOW. *NBI Response*, attached FOIA Documents, Page 57 of 61; see also *AR* Tab 19 at 13-14 (undated assertions of fact and arguments by NBI). The ODRA declines to consider extrinsic evidence outside of the plain language of the SOW to interpret this unambiguous SOW provision. It is well established that where there is no ambiguity in the pertinent terms of a contract, evidence of any alleged oral modification that contradicts the express language of the subsequent written contract will not be considered. *United States v. Johnson*, 43 F.3d 1308, 1311 (9th Cir. Cal. 1994), citing *United States v. Triple A Machine Shop, Inc.*, 857 F.2d 579 (9th Cir. 1988).

would have created a duty for NBI to inquire and obtain clarification, which it failed to do. See *SOS International, Ltd. v. DOJ*, CBCA No. 3678, 14-1 BCA ¶35,751, citing *HPI/GSA-3C, LLC v. Perry*, 364 F.3d 1327, 1334 (Fed. Cir. 2004); *Metric Constructors, Inc. v. National Aeronautics & Space Administration*, 169 F.3d 747, 751 (Fed. Cir. 1999).

## **B. Ceramic Floor Tile Cleaning Claim**

NBI also claims the costs it incurred to clean the original ceramic floor tile pursuant to an alleged oral agreement it made with the COR in February of 2013. *NBI Response* at 3. According to NBI, the COR understood that the Contract did not obligate NBI to replace the ceramic floor tile, but nevertheless sought to address concerns raised by the building occupants as to the poor condition of the existing floor. *Id.* NBI asserts that the floor tile, “while in good physical condition, was very dirty due to the build-up of wax and dirt over the years.” *NBI Response* at 3. NBI’s President states: “I told [the project engineer] ... that Northern Building would clean the tile as a good faith offer at no cost to the FAA. Northern then proceeded with the tile cleaning.” *Id.* In this regard, NBI argues: “The Agency does not dispute that the [cleaning] work was ordered ... completed ... [and] accepted” but that it “simply does not want to pay for the work.” *Id.*<sup>4</sup>

The record shows that NBI was notified, orally and in writing, of the scope of CO’s authority, as well as that of the COR. *AR* Tab 4 at 3; Tab 5; and Tab 10. Along with the copy of the NTP, NBI also was provided a copy of the Contracting Officer’s Designation of Contracting Officer’s Representative for the project (“Designation”). *AR* Tab 4. The Designation expressly set forth the authority of the COR to take certain actions, such as to conduct inspections for compliance, approve progress schedules and material submittals, and the like. *Id.* The Designation, however, expressly prohibited the COR from making “contractual commitments outside the scope of the contract or execute or agree to modifications or take actions that would commit the Government to a change in contract price, quality, quantity or delivery schedule.” *Id.* The Designation further prohibited COR from taking such actions as directing the contractor on how to perform the work and settling or deciding contractual matters in dispute. *Id.* The record also contains a

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<sup>4</sup> None of these representations were made in an affidavit or declaration pursuant to 28 U.S.C. §1748.

signature from NBI acknowledging the fact that during a pre-construction conference on October 4, 2014, the issues of contractual authority, and the need for contract changes to be in writing, were specifically addressed by the CO. *AR* Tab 5.

It is well settled that “to modify a contract, a contracting officer or his or her delegate must possess actual authority to bind the government.” *Winter v. Cathedral/Baltimore Joint Venture*, 497 F.3d 1339, 1344 (Fed. Cir. 2007). Moreover, as set forth in the Contract, any modification of its terms was required to be in writing in order to be effective. *AR* Tab 2, at 30 (incorporating AMS § 3.10.1-15) (“The Contracting Officer may... by *written order*... make changes....”) (emphasis added). When limitations on the authority of contracting officials have been communicated to the contractor, they are binding on the contractor. *David W.E. Cabell*, VABCA No. 3402, 93-2 BCA ¶ 25,598 (COR has no authority to interpret an unambiguous contract in a manner that leads to additional compensation); *Construction Equip. Lease Co. v. United States*, 26 Cl. Ct. 341 (1992) (COR had no authority to change contract in face of explicit language in appointment letter).

NBI failed to provide reliable evidence of an oral agreement; much less one made by someone with actual authority to bind the Government to a modification in contract scope or price. NBI simply has failed to satisfy its burden of proof on this issue.

### **C. Remaining Claims**

Finally, NBI seeks the costs of increased labor hours, mobilization, travel, lodging, and delay that it allegedly incurred as a consequence of replacing the ceramic floor tile in the bathrooms. *NBI Response* at 4 and 6. The ODRA finds that NBI incurred these costs as the result of its own actions and inactions.

As evidenced by its email, dated April 16, 2013, NBI resisted the CO’s direction to replace the ceramic floor tile as specified in the Contract, asserting that “[t]he tile in the bathrooms is in excellent condition and does not need replacing.” *AR* Tab 13 at 1-2.<sup>5</sup> That email also claims the

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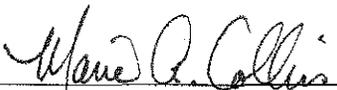
<sup>5</sup> The email also admits that NBI had not included in its bid “any money for any tile.” *Id.*

existence of yet another understanding between NBI and the COR that the bathroom tile would be replaced at no additional cost in exchange for ordering additional work, namely, painting the mechanical/storage room floors and installing new carpet in the Control Tower Cab. *Id.*; *NBI Response* at 5. On April 17, 2013, the CO again specifically directed NBI to proceed with replacing the floor tile “as referenced in the punch list dated 3/26/2013 ... and identified on 2/27/2013.” *Id.* One month later, by letter dated May 23, 2013, the CO formally notified NBI of its delinquent contract performance and the need to complete its work, including the replacement of ceramic floor tile in the bathrooms. *AR* Tab 16 at 2; Tab 17.

Based on the above, the ODRA finds that the alleged additional costs that NBI incurred cannot be said to arise from any “change” to the Contract with respect to the ceramic floor tile. Rather, the ODRA finds that these costs were the result of NBI’s erroneous reading of the Solicitation, and subsequent delay in complying with the Contract’s requirements, while it attempted, unsuccessfully, to negotiate a change order that would relieve it of its obligation to replace the ceramic floor tile in all three bathrooms.<sup>6</sup>

### **III. Recommendation**

For the foregoing reasons, the ODRA recommends that NBI’s contract dispute be denied in its entirety.



Marie A. Collins

Dispute Resolution Officer and Administrative Judge  
FAA Office of Dispute Resolution for Acquisition

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<sup>6</sup> NBI also raises a claim of unjust enrichment and the corresponding equitable remedy of quantum meruit. The ODRA need not address these theories of recovery, since the work at issue was governed by a valid contract between the parties. Case law makes clear that “the doctrine of unjust enrichment, for which quantum meruit is a remedy, is an equitable one, applied to those situations where the rights and remedies of the parties are *not defined in a valid contract.*” *Minuteman Aviation, Inc.*, AGBCA No. 99-115-1, 2000-1 BCA ¶ 30,831.