

**UNITED STATES DEPARTMENT OF TRANSPORTATION  
FEDERAL AVIATION ADMINISTRATION  
OFFICE OF DISPUTE RESOLUTION FOR ACQUISITION**

Contract Dispute of	)	
	)	
Prow'ess Construction Corp.	)	23-ODRA-00948
	)	
Under Contract No. 697DCK-20-C-00150	)	

*Appearances:*

For Prow'ess Construction Corp:	Dan Maher, Esq.
For the FAA Product Team:	Alicia M. Harrington, Esq.

**FINDINGS AND RECOMMENDATIONS**

Prow'ess Construction Corporation ("Prow'ess") filed this contract dispute seeking an equitable adjustment of \$13,029.02 for replacement of materials damaged during a suspension of work issued in response to the COVID-19 pandemic. Under the same docket number, the Federal Aviation Administration ("FAA") Product Team asserts its own contract dispute, i.e., a counterclaim, seeking \$113,395.00. ODRA recommends denying Prow'ess's contract dispute in its entirety. It recommends granting the Product Team's contract dispute, denying the claimed amount as unproven, and granting a nominal downward adjustment of \$1,000 to the contract price.

**I. Background and Nature of the Contract<sup>1</sup>**

The Product Team awarded Prow'ess contract number 697DCK-20-C-00150 for roof replacement work at the Indianapolis Air Route Traffic Control Center.<sup>2</sup> The Contracting Officer ("CO") issued the Notice to Proceed on September 25, 2020, and on October 6, 2020, Prow'ess received delivery of "DensDeck" roof board, which is the subject of its claim.<sup>3</sup> But on the delivery day, the CO sent a suspension of work notice to Prow'ess that required the immediate and "orderly shutdown of all work on site" due to the Federal response to the COVID-19 pandemic.<sup>4</sup> Regardless of the suspension notice, on October 14, 2020, Prow'ess submitted Progress Billing 003

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<sup>1</sup> The background findings rely mostly on the parties' Joint Statement of Undisputed Facts (JSUF), which contains 37 stipulations. They are cited herein by number, *e.g.*, JSUF No. 37.

<sup>2</sup> JSUF No. 1.

<sup>3</sup> JSUF Nos. 2 and 4.

<sup>4</sup> Product Team ("PT") Substantive Response Ex. 3 (also attached to Prow'ess's Contract Dispute).

that included \$72,465.00 for the roofing materials, which the FAA paid.<sup>5</sup> As will be addressed in greater detail later, Prow'ess's claim concerns whether Prow'ess or the Product Team is financially responsible for weather-related damage to the roof board that occurred during the suspension period.

The Product Team's counterclaim concerns nonperformance and workmanship issues relating mostly to coping, which is a sheet metal cap system at the top of masonry walls. The Product Team discovered the issues after Prow'ess informed the Government that the project was finished, which led FAA personnel to perform a Contractor Acceptance Inspection ("CAI").<sup>6</sup> On February 1, 2022, the Government sent Prow'ess a list of exceptions and action items. Many action items involved coping, flashing, and caulking defects on the various roofs.<sup>7</sup> On June 10, 2022, Prow'ess responded with a course of action ("COA"), which the parties stipulate did not meet contract requirements.<sup>8</sup> In May of 2023, the contracting officer requested a final bill, but final payment has not been made even though Prow'ess submitted a Certificate of Completion.<sup>9</sup>

Prow'ess filed its contract dispute on September 8, 2023, which it amended on November 16, 2023. The Product Team filed its substantive response, its own contract dispute (cited as "PT Counterclaim"), and exhibits (cited as "PT Ex.") on December 19, 2023. The parties filed final submissions, stipulated to facts, and waived conducting a hearing.<sup>10</sup>

## **II. Burden of Proof and Standard of Review**

ODRA reviews Acquisition Management System ("AMS") contract disputes *de novo*, and the burden of proof rests with the party seeking relief.<sup>11</sup> ODRA uses the preponderance of the evidence standard to determine whether a party has met its burden of proof.<sup>12</sup>

## **III. Preliminary matter: The objection to Prow'ess Exhibit 8 is sustained.**

Section 17.33(d) of the ODRA Procedural Regulation provides, "Unless timely objection is made, documents properly filed with the ODRA will be deemed

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<sup>5</sup> JSUF No. 5.

<sup>6</sup> JSUF Nos. 23-25.

<sup>7</sup> JSUF Nos. 26-27.

<sup>8</sup> JSUF Nos. 32-33.

<sup>9</sup> JSUF Nos. 35-37.

<sup>10</sup> As to waiving the hearing, *see* JSUF at 1.

<sup>11</sup> *Zullo Building Maintenance, LLC*, 13-ODRA-00676 (citing 5 U.S.C. § 556(d); 14 C.F.R. § 17.33(m)).

<sup>12</sup> 14 C.F.R. § 17.33(l) (2024).

admitted into the administrative record.”<sup>13</sup> In accordance with the established adjudication schedule in this matter, Prow’ess timely filed a document it calls “FAA Covid 19 Restrictions.” It bears a handwritten designation showing it came from an unrelated ODRA matter (23-ODRA-00947), which involved work at the Denver Air Route Traffic Control Center.<sup>14</sup> The handwritten designation also identifies it as “Prow’ess Ex 8,” but unfortunately, there is another document bearing that designation, specifically, a Daily Field Report dated May 16, 2022. At issue is the “FAA Covid 19 Restrictions” document from case number 23-ODRA-00947.

The Product Team filed a timely objection to the exhibit and explained:

Relevancy. This exhibit is an email from a Contracting Officer in Des Moines, WA, regarding a project at the Denver ARTCC and not the Contract at issue. None of the FAA parties on the email were part of the Indianapolis project.<sup>15</sup>

Prow’ess, in its Final Submission, counters that Exhibit 8 “is certainly relevant to the issues in this case in that it delineates how the FAA was enforcing and implementing its nationwide Covid [sic] shutdown including barring contractors from the various worksites.”<sup>16</sup>

ODRA proceedings are governed by the Administrative Procedure Act, which authorizes ODRA to: (1) receive “relevant evidence”; (2) exclude “immaterial” evidence; and (3) consider only “reliable, probative” evidence.<sup>17</sup> Exhibit 8 at issue is not related to Prow’ess’s contract at the Indianapolis ARTCC or the positions taken in the present disputes. Further, contrary to Prow’ess’s argument, it does not establish a “nationwide” COVID shutdown. ODRA sustains the objection.

#### IV. Discussion

ODRA first considers Prow’ess’s amended contract dispute and concludes that it should be denied. ODRA then considers the counterclaim, which is supported on the merits, but lacks sufficient support for the claimed downward adjustment to the contract price. In these circumstances, ODRA recommends granting only a nominal adjustment.

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<sup>13</sup> *Id.* at § 17.33(d).

<sup>14</sup> *See generally, Contract Dispute of Prow’ess Construction Corp.*, 23-ODRA-00947 (Findings and Recommendations, slip op. at 1).

<sup>15</sup> PT Objection to Exhibits at 1.

<sup>16</sup> Prow’ess’s Final Submission at 5.

<sup>17</sup> 5 U.S.C. § 556(c)(3), (d).

**A. Prow'ess's contract dispute is denied because Prow'ess's duty to protect the work was not changed.**

Prow'ess claims it is entitled to an equitable adjustment under the Changes clause for replacement of the roof board.<sup>18</sup> It says the shut down “constituted a change in the method or manner of performance of the work on the job” because “Prow'ess was unable to perform work regarding the roofing material.”<sup>19</sup> The Product Team responds that the claim must be denied because:

AMS Clause 3.3.1-2(f)(1) stipulates that payments made do not relieve the Contractor from responsibility for the materials. This obligation is further emphasized by the Contract's Specifications, Section 01 11 00, Part 1.1, Paragraph O.3 where “it **shall be the responsibility of the Contractor to replace any damaged work including finishes, material and equipment.**”<sup>20</sup>

Consistent with the text emphasized in the quote, the specification expressly defines “work” as including materials.<sup>21</sup> Thus, the Product Team contends that its stop work notice did not relieve Prow'ess of its obligation to protect the roofing material, and therefore, Prow'ess must bear the cost of its replacement.

For the Changes clause to apply, there must be an express or constructive change order from the Contracting Officer.<sup>22</sup> As Prow'ess contends, the clause allows the contracting officer to change the “method or manner of performance of the work.” The contract, however, did not impose specific requirements, i.e., a manner or method, for protecting the materials from the weather. Neither did the Suspension of Work notice. On the contrary, the notice gave Prow'ess wide latitude in how to accomplish its obligation to stop work:

The FAA will review and consider potential claims for reasonable demobilization and remobilization costs. Said costs may include costs to store or protect property, and/or on-site costs deemed prudent due to an evaluation of the **cost to keep items on site vs. the cost to demobilize**

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<sup>18</sup> Prow'ess's Amended Contract Dispute at 3.

<sup>19</sup> *Id.*

<sup>20</sup> PT Substantive Response at 5 (emphasis added by the Product Team).

<sup>21</sup> PT Substantive Response Ex. 1a. at § 01 11 00, 1.1 A.2. (Contract specification's general requirements). Prow'ess also attached this to its Amended Contract Dispute.

<sup>22</sup> *See* AMS Clause 3.10.1-15, “Changes-Construction, Dismantling, Demolition, or Removal of Improvements (July 1996),” which was incorporated by reference into the contract. *See* PT Ex. at 21. Prow'ess has not claimed that an authorized delegee—such as the Contracting Officer's Representative—issued a constructive change.

items (such as the construction trailer, sissorlift, etc.). You should provide appropriate notice to any subcontractors or suppliers.<sup>23</sup>

As the emphasized text shows, the notice did not specify a manner or method for protecting materials and instead left to Prow'ess's discretion whether to leave the materials on site or remove them.

Regardless of the actual text quoted above, Prow'ess's Amended Contract Dispute states that "the FAA made the decision regarding the storage of the roofing material."<sup>24</sup> Prow'ess did not cite evidentiary support for this statement nor did it provide evidentiary support as the record developed.<sup>25</sup> At best, the Suspension of Work Notice asked Prow'ess to "please follow directions as provided by the on-site COR [contracting officer's representative]," but no evidence shows that the COR required Prow'ess to store the materials on site.<sup>26</sup> Even if the COR designated a location for storage, there is a meaningful distinction between *allowing* the contractor to store materials and *directing* the contractor to store materials. Thus, ODRA finds that no authorized FAA employee issued an actual nor constructive change order supporting Prow'ess's contract dispute.

Lastly, if ODRA reads the Amended Contract Dispute liberally, it could infer that Prow'ess asserts the Product Team breached the implied duty of good faith and fair dealing by denying Prow'ess access to the site so that it could care for the material.<sup>27</sup> The burden of proving this inferred allegation naturally rests with Prow'ess, but the law and the preponderance of the evidence shows no breach. Preliminarily, the implied duty does not alter the express language under the Suspension of Work clause, which allows the Government to temporarily suspend work on site.<sup>28</sup> Acting within the bounds of both the Suspension of Work Notice and Prow'ess's obligation to protect the materials, the CO's notice explained an "adjustment" to the contract price could be made if Prow'ess elected "to store or

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<sup>23</sup> PT Substantive Response Ex. 3 (emphasis added).

<sup>24</sup> Prow'ess's Amended Contract Dispute at 3.

<sup>25</sup> See Prow'ess Final Submission at 4.

<sup>26</sup> PT Substantive Response Ex. 3.

<sup>27</sup> "Prow'ess's ability to perform [its duty to protect the material] was prevented by the Covid [sic] shut down restrictions implemented by the government in response to the Covid 19 pandemic." Amended Contract Dispute at 3. Prow'ess does expressly style these allegations as support for a breach of the duty to cooperate.

<sup>28</sup> See e.g., *Kellogg Brown & Root Services, Inc. v. United States*, 109 Fed. Cl. 288, 300 (2013) (citing *Scott Timber Co. v. United States*, 692 F.3d 1365, 1375 (Fed. Cir. 2012) (" '[T]he assertion of a legitimate contract right cannot be considered as violative of a duty of good faith and fair dealing.' " (quoting *David Nassif Assocs. v. United States*, 644 F.2d 4, 12 (Ct.Cl.1981))).

protect property” during demobilization.<sup>29</sup> But Prow’ess stored the material on site in shrink wrap,<sup>30</sup> and Prow’ess offers no evidence demonstrating that its personnel attempted to visit the site thereafter to check on the material. More importantly, nothing shows that the Product Team refused admission to the site for Prow’ess’s personnel wishing to check on the stored materials. On the contrary, while there is no record of when the materials became exposed to the weather and damaged, the parties have stipulated that on March 25, 2021, the CO notified Prow’ess that the materials were exposed and invited Prow’ess to the site to cover them.<sup>31</sup> Prow’ess did not go to the site and did not cover the materials.<sup>32</sup> On this record, ODR finds no breach of the implied duty of good faith and fair dealing.

Thus, Prow’ess’s obligation to protect the materials remained unchanged even under the Suspension of Work Notice. Prow’ess had discretion over the manner and method used to protect the material, and it bore the risk of loss. ODR finds, therefore, that a change under the Changes clause did not occur, and it recommends denying Prow’ess’s contract dispute.

## **B. The Product Team’s Counterclaim**

The Product Team’s counterclaim alleges defective installation of flashing and coping. Although it raises many specific performance issues on the merits, it offers only a lump sum claim of \$113,395 covering all issues plus work not addressed on the merits.

### **1. Kato Lite Roof Coping**

The contract required Prow’ess to replace the roof on the southern engine generator room of the Power Service Building.<sup>33</sup> The contract refers to the room as the “Kato [L]ite.”<sup>34</sup> The Product Team claims that Prow’ess “did not install flashing and coping on the Kato Lite roof” as allegedly required by specification detail number 3 shown on Drawing A-316.<sup>35</sup> During performance, Prow’ess reportedly

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<sup>29</sup> PT Substantive Response Ex. 3 (also attached to Prow’ess’s Contract Dispute). Unlike an “equitable adjustment” under various clauses, an “adjustment” under the Suspension of Work clause does not include profit.

<sup>30</sup> Prow’ess Amended Contract Dispute at 2.

<sup>31</sup> JSUF No. 6.

<sup>32</sup> *Id.*

<sup>33</sup> PT Counterclaim Ex. 1 (the contract) at 8.

<sup>34</sup> *Id.* The contract does not use a capital letter for the word *lite*, but most of the exhibits and filings do capitalize the word. ODR adopts the capitalized version for consistency.

<sup>35</sup> PT Counterclaim at 7.

took the position that the contract did not require new coping for the Kato Lite work.<sup>36</sup>

In very general terms, Section C of the contract (“Scope of Work”) broke the work into three general tasks:

Replacement of the Various Roofs consisting of the Following; [1] Control Wing - Upper and Lower DSR, and control room expansion, and the [2] Power Service Building - South (Kato lite) and North (White) engine generator rooms, the ACEPS/Switchgear room, and [3] fall protection to the Admin Wing Roof at the Indianapolis Air Route Traffic Control Center (ARTCC) in Indianapolis, Indiana.<sup>37</sup>

As stated, the work at issue here involves the Kato Lite roof, and therefore is found in the Power Service Building. The three general tasks relied on different drawings, as explained in the Scope of Work:

The Work includes, but is not limited to:

a. Replacement of the Control Wing roofs and Power Service Building roofs as per drawings ZID-D-ARTCC-A309 and ZID-D-ARTCC-A312/ZID-D-ARTCC-A313 respectively.

...

h. Provide fall protection to the Admin Wing Roof as per drawing ZID-D-ARTCC-A308.<sup>38</sup>

Thus, the Kato Lite roof, as part of the Power Service Building, was described in drawings ZID-D-ARTCC-A312 (“A-312”) and ZID-D-ARTCC-A313 (“A-313”).

As would be expected with this kind of replacement work, drawings A-312 and A-313 show the existing structures and use specific notes—represented by numbered diamonds—to call out specific work to be done on the existing structures. The diamond for note 2 on these drawings reads, “Remove and dispose of metal cap coping, provide new 26 gauge metal cap coping of existing color.”<sup>39</sup> Of particular importance, a note 2 diamond is found on drawing A-312, pointing to the top of walls that form the Kato Lite room.<sup>40</sup> Tracing the drawings from the top view

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<sup>36</sup> PT Counterclaim Ex. 8.

<sup>37</sup> PT Counterclaim Ex. 1, at 6, Section C (bracketed numbers added).

<sup>38</sup> PT Counterclaim Ex. 1, at Section C.

<sup>39</sup> PT Counterclaim Ex. 24, at drawings A-312 and A-313.

<sup>40</sup> PT Counterclaim Ex. 24 at Drawing A-312 (drawing grid locations B3 and B4).

(drawing A-312), to a general side view (drawing A-313), to a detailed side view (drawing A-314) with a reference to detail drawing 3 on A-316, leads to the very detail that the Product Team has referenced in its claim. Consistent with the requirements found in note 2 of drawing A-312, detail number 3 on drawing A-316 depicts the prefinished metal coping at issue. Thus, ODRA finds that Prow'ess was obligated to replace the Kato Lite coping as the Product Team contends.<sup>41</sup>

The stipulations establish that FAA personnel became aware of this issue after a leak on November 22, 2021.<sup>42</sup> Stipulation 22 states, "Prow'ess patched the existing coping/flashing on the Kato Lite roof but did not replace it."<sup>43</sup> Consistent with Stipulation 22, the contemporaneous record has notes stating Prow'ess had not replaced the Kato Lite coping.<sup>44</sup> Prow'ess has offered no evidence suggesting that it performed the work. Thus, ODRA finds that Prow'ess did not provide new Kato Lite coping as obligated under the contract.

## 2. Coping and Caulking Quality Issues

The Product Team offers 17 photographs as evidence of poor workmanship and improper caulk color.<sup>45</sup> The allegations of poor workmanship include:

- Gaps between the coping runs (PT Counterclaim Ex. 25);
- Caulking at corner seams ( PT Counterclaim Exs. 26, 27);
- Caulking blobs (for lack of a better term) (PT Counterclaim Ex. 28);
- Uneven and wavy runs of coping (PT Counterclaim Exs. 29, 36);
- Crooked seams with glue showing (PT Counterclaim Exs. 30 – 34);
- Crooked, uneven caulking seams (PT Counterclaim Exs. 36 – 38); and
- Membrane, flashing, patches, and related caulking issues (PT Counterclaim Exs. 39 – 42).

Although these photographs were admitted without objection,<sup>46</sup> they are not supported by a declaration or testimony explaining the photographed locations, the problems with the work, or how quality should be assessed. At best, ODRA has

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<sup>41</sup> The claim also concerns "flashing," but without explanation. PT Counterclaim at 7. Note 3 in the roof drawings requires removing flashing to access coping, but there are no note 3 diamonds shown on Kato Lite drawings, i.e., A-312 or A-313. Note 3 diamonds appear on drawing A-309, which covers the Control Wing, but that building is not relevant to the counterclaim.

<sup>42</sup> JSUF No. 19.

<sup>43</sup> JSUF No. 22.

<sup>44</sup> PT Counterclaim Ex. 8 (a Weekly Field Progress Report for the week ending January 1, 2022).

<sup>45</sup> PT Counterclaim at 9-17; PT Counterclaim Exs. 25 to 42.

<sup>46</sup> See 14 C.F.R. § 17.33(d) (2024).

before it only the arguments of counsel, citations to various contract requirements, and the pictures themselves.

Analysis of this claim starts with the contract requirements. First, as to color of the caulk, the Product Team does not identify an express requirement for caulk color. It refers to Specification section 07 71 00, Part 1.7 B, which requires the contractor to “coordinate roof specialties with flashing, trim, and construction of parapets, roof deck, etc.,” but caulk color is not expressly mentioned here.<sup>47</sup> If the Product Team implies that the word *coordinate* dictates color, ODR does not agree. The language refers to function—not architectural appeal—so that the work of the various trades come together to “provide a leakproof, secure and noncorrosive installation.”

Workmanship is a different matter. Section 01 10 00 of the specification includes text that generally address quality:

#### 1.1 SUMMARY

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C. Intent of Specifications: All material, labor and equipment required to perform the work shall be furnished by the Contractor. **All work shall be accomplished by experienced workers in accordance with the highest standards of the various work trades involved.** All work performed and all materials and equipment used shall be approved by the COR. This shall include, but not be limited to, testing, inspection, scheduling, reporting, and submittals.

...

G. Materials: ...

1. Workmanship: All work shall be accomplished by workers experienced in each trade in accordance with the highest standards of the various trades involved. The Contractor is required to have a minimum of five (5) years experience, for the applicable installation. All details shall be approved by the COTR to assure a professional, complete project, whether stated in the specifications or not.<sup>48</sup>

Additionally, section 07 71 00 addressed “roof specialties,” including coping. The general installation requirements included quality standards:

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<sup>47</sup> PT Counterclaim at 6 (citing PT Ex. 1a. at § 07 71 00).

<sup>48</sup> PT Counterclaim Ex. 1a. at § 01 10 00, pp. 1 and 2 (emphasis added).

### 3.3 INSTALLATION, GENERAL

A. General: Install roof specialties according to manufacturer's written instructions. Anchor roof specialties securely in place, with provisions for thermal and structural movement. Use fasteners solder, protective coatings, separators, underlayments, sealants, and other miscellaneous items as required to complete roof-specialty systems.

1. **Install roof specialties level, plumb, true to line and elevation; with limited oil-canning and without warping, jogs in alignment, buckling, or tool marks.**
2. **Provide uniform, neat seams with minimum exposure of solder and sealant.**
3. Install roof specialties to fit substrates and to result in weathertight performance. Verify shapes and dimensions of surfaces to be covered before manufacture.<sup>49</sup>

Thus, summarizing these sections of the specification, the Product Team was entitled to receive work that was “of the highest standard for the trade,” which included at a minimum, neat seams; level, true and plumb installation; no buckling, and minimum exposure of sealant. Moreover, the ultimate installation by all trades combined had to “provide a leakproof, secure, and noncorrosive installation.”

In order to sustain the counterclaim, ODRA must find that the work performed did not meet the stated quality standards. While the photographs in the record are not accompanied by testimonial explanations, they are not needed in this case.<sup>50</sup> ODRA finds by the preponderance of the evidence that the seam seals are sloppy, lumpy, jagged, and in no way “uniform, neat ... with minimum exposure of ... sealant.”<sup>51</sup> Buckling is evident.<sup>52</sup> Sealant is unreasonably exposed.<sup>53</sup> Gaps are evident in a small portion of membrane and flashing.<sup>54</sup> Contributing to these findings, ODRA notes that regardless of the lack of testimony in this proceeding, the contemporaneous record shows that inspectors reached the same conclusions and placed these items on the CAI, which listed numerous issues with the work.<sup>55</sup> A

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<sup>49</sup> *Id.* at § 07 71 00, p. 8 (emphasis added).

<sup>50</sup> *Accord Protests of IBEX Weather Services*, 13-ODRA-00641, -00644 (Findings and Recommendations (Pub. Ver.) slip op. at 54, n.26) (handwriting expert not required to assess handwriting samples).

<sup>51</sup> *See e.g.*, PT Counterclaim Exs. 26, 33, 34, 35, 36, and 38.

<sup>52</sup> PT Counterclaim Ex. 29.

<sup>53</sup> PT Counterclaim Ex. 31 and 32.

<sup>54</sup> PT Counterclaim Ex. 40, and 42.

<sup>55</sup> PT Counterclaim Ex. 11.

similar version marked up by the contractor shows no challenges to the inspection of the caulking, and no check marks suggesting they were fixed.<sup>56</sup> Moreover, Prow'ess does not deny defective work in its Substantive Response. These factual findings support the ultimate finding that Prow'ess failed to conform to the quality standards of the contracts and never remedied defects in the coping installation.

As stated, Prow'ess does not deny the defective work. Instead, it raises a defense of laches. The doctrine of laches “bars a claim when a plaintiff’s ‘neglect or delay in bringing suit to remedy an alleged wrong, which taken together with lapse of time and other circumstances, causes prejudice to the adverse party.’”<sup>57</sup> Prow'ess bases the start of the issue as January 25, 2022, the date of the FAA’s CAI that reported the defects.<sup>58</sup> Notwithstanding the fact that the Product Team filed its counterclaim on December 19, 2023, i.e., within the two-year accrual period defined in the ODRA’s rules,<sup>59</sup> ODRA finds that Prow'ess fails to argue or show prejudice.<sup>60</sup> Notably, Prow'ess relies on a definition that unreasonably omits the requirement for prejudice.<sup>61</sup> ODRA finds that the defense of laches is not supported in the record.

Taken together, ODRA finds that Prow'ess did not perform the coping and caulking requirements of the contract within the specified standards of quality and workmanship.

### **3. Quantum: The Product Team has not provided reliable and probative evidence for its price reduction.**

Success on the merits is only half of a contract dispute. The other half is quantum, i.e., determining the monetary amount of an adjustment, equitable adjustment, or other liability. In this matter, the Product Team seeks entitlement to \$113,395.

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<sup>56</sup> PT Counterclaim Ex. 13.

<sup>57</sup> *Harmonia Holdings Group, LLC v. United States*, 166 Fed. Cl. 727, 737 (2023) (citations omitted).

<sup>58</sup> Prow'ess’s Substantive Response at 8.

<sup>59</sup> *See* 14 C.F.R. § 17.3(b) (2024).

<sup>60</sup> ODRA also does not reach the question of whether a laches defense lies when the contract dispute was filed within the regulatory or contractual period of limitations. In the context of patent infringement, for example, the defense is not applicable. *SCA Hygiene Products Aktiebolag v. First Quality Baby Products, LLC*, 580 U.S. 328, 346 (2017).

<sup>61</sup> Prow'ess’s Substantive Response at 8.

The Product Team relies on AMS Clause 3.10.4-10, Inspection of Construction (September 2009) to establish its right to recovery.<sup>62</sup> The clause provides in relevant part:

- (f) The Contractor shall, without charge, replace or correct work found by the Government not to conform to contract requirements, unless the Government determines that it is in the public interest to accept the work with an appropriate adjustment in contract price. The Contractor shall promptly segregate and remove rejected material from the premises.
- (g) If the Contractor does not promptly replace or correct rejected work, the Government may:
  - (1) by contract or otherwise, replace or correct the work and charge the cost to the Contractor or
  - (2) terminate for default the Contractor's right to proceed.<sup>63</sup>

Oddly, the Product Team relies on (g) even though it has not actually replaced or corrected the work and does not (and cannot) assert actual costs incurred to charge Prow'ess.<sup>64</sup> Instead, it submitted a nonprobative and unreliable document to establish that the value of the unsatisfactory work is \$113,395. Thus, in this matter, the Product Team has accepted remaining work and implicitly relies on paragraph (f) to reduce the contract amount by \$113,395 prior to final payment.<sup>65</sup>

In an unrelated *Prow'ess* case, ODRA reviewed and explained the generally accepted methods to establish the amount of a downward adjustment.<sup>66</sup> It concluded by stating, “the goal is to obtain an accurate estimate for the value or cost of the unperformed work, including using the contractor’s own actual costs if possible.”<sup>67</sup> In that case, ODRA accepted the product team’s estimate from a licensed engineer who was “specifically trained in cost estimating.”<sup>68</sup> Importantly, the estimator “used Prow'ess’s own overhead and profit rates, and also standard

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<sup>62</sup> PT Counterclaim at 4-5, 8.

<sup>63</sup> AMS Clause 3.10.4-10, Inspection of Construction (September 2009), at (g).

<sup>64</sup> PT Counterclaim at 4-5, 8.

<sup>65</sup> PT Counterclaim at 8.

<sup>66</sup> *Contract Dispute of Prow'ess Construction Corp*, 23-ODRA-00947 (Findings and Recommendations slip op. at 6-7).

<sup>67</sup> *Id.* at 7.

<sup>68</sup> *Id.*

estimating tools.”<sup>69</sup> His approach aligned with the jury verdict method, generally accepted in the field of Government contracts and specifically accepted by ODRA in the *Contract Dispute of Strand Hunt Construction*. As explained in *Strand Hunt*:

The following three factors must exist before using a jury verdict approach, namely: (1) that clear proof of injury exists, (2) that there is not a more reliable method for computing damages, and (3) that the evidence is sufficient for a court [or the ODRA] to make a fair and reasonable approximation of the damages.”<sup>70</sup>

In the present matter, the Product Team has not satisfied the third factor, i.e., provided sufficient evidence to make a fair and reasonable approximation of the adjustment.

The Product Team’s lone evidentiary item is PT Ex. 20, which the Product Team describes (without elaboration) as a “quote to repair the flashings and copings.”<sup>71</sup> The offeror and author are redacted, but ODRA infers it is not from Prow’ess, so it clearly does not use Prow’ess’s rates for indirect costs and profit. In fact, indirect costs and profit are not stated. The Product Team gives no insight into the training or qualifications of the estimator. Likewise, the Product Team gives no insight into the circumstances—competitive or otherwise—of obtaining the quote. Notably, the scope of work exceeds the poor workmanship and omitted work claimed in the counterclaim; the quote includes items like 30 feet of new flashings (which far exceeds the small amount of flashing shown in PT Ex. 42), “wood blocking,” and “perimeter securement.” Further, ODRA cannot segregate claimed repairs versus new work because prices are not stated separately for each work element. Accordingly, the document lacks reliability and probity, thereby rendering it insufficient to support a fair and reasonable adjustment.<sup>72</sup>

As a final point, ODRA considers whether it should award a nominal adjustment. In *Valley Asphalt Corp.*, which predated the Contract Disputes Act

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<sup>69</sup> *Id.*

<sup>70</sup> *Contract Dispute of Strand Hunt Construction*, 99-ODRA-00142 (Findings and Recommendations (Pub. Ver.) slip op. at 125) (citing *Vehicle Maintenance Services*, GSBICA No. 11663, 94-2 BCA ¶ 26,893; *Dawco Construction, Inc. v. United States*, 930 F.2d 872 (Fed. Cir. 1991)).

<sup>71</sup> PT Counterclaim at 4.

<sup>72</sup> 14 C.F.R. § 17.33(m) (2024); 5 U.S.C. § 556(d) (a claim must be supported with “reliable, probative, and substantial evidence”).

(“CDA”),<sup>73</sup> the Armed Services Board of Contract Appeals (“ASBCA”) accepted awarding nominal damages under Government inspection clauses. First, the ASBCA explained that the clauses provide price adjustments *under* the contract that are the equivalent of “damages” in cases of partial *breach* of the contract:

It is now the general rule in American courts that a contractor who has rendered substantial performance of the promised equivalent of the contract price can get judgment for that price, less deductions for minor defects and nonperformance (*Corbin, Contracts*, 1960 ed., Vol. 3A, Sec. 701). The provision in the disputed contract (‘Inspection and Acceptance,’ par. b) permitting an appropriate adjustment in contract price for nonconforming material or workmanship, **is but a mechanism by which a remedy equivalent to damages for partial breach may be had under the terms of the contract.**<sup>74</sup>

The ASBCA then found that a contractor’s poor performance yielded a completed runway with a value “not measurably less than the value of the completed runway as promised.”<sup>75</sup> Given that the Government had proven injury but not the amount claimed, the ASBCA awarded nominal damages of \$1,000.<sup>76</sup>

ODRA exercises its own jurisdiction and is not bound by the CDA.<sup>77</sup> Thus, it is like the pre-CDA ASBCA in *Valley Asphalt* and not prevented from awarding nominal adjustments. Prow’s clearly caused injury—in the sense of a legally recognizable wrong—when it failed to install the Kato Lite coping and provided subpar workmanship. While the Product Team has not provided a fair and reasonable basis to determine a higher price adjustment based on the value of the work, a nominal adjustment is appropriate. Nominal amounts are never high, but they are derived from the circumstances or judicial practice.<sup>78</sup> In this case, the contract had an award amount of \$745,572.<sup>79</sup> A nominal adjustment of \$1,000, as

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<sup>73</sup> After passage of the CDA in 1978, the ASBCA concluded that it lacked authority to award nominal damages because the CDA limited remedies to those available at the Court of Claims, which could not render such awards. *See Appeal of Cramer Alaska, Inc.*, ASBCA No. 47725, 96-1 BCA ¶ 27871 (citing CDA § 8(d); *Marion & Rye Valley R. Co. v. United States*, 270 U.S. 280, 282 (1926)).

<sup>74</sup> *Appeal of Valley Asphalt Corp.*, ASBCA No. 17595, 74-2 BCA ¶ 10680 (emphasis added).

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> 49 U.S.C. § 40110(d).

<sup>78</sup> *See generally*, Restatement (Second) of Contracts § 346(2), cmt. b. (Am. Law Inst. 1981).

<sup>79</sup> PT Counterclaim Ex. 1a. at 2.

in *Valley Asphalt*, is appropriate and represents less than one percent of the claimed amount of \$113,395 and far less than they contract as a whole.

Accordingly, the Product Team's Contract Dispute should be sustained, and the contract price should be reduced by \$1,000 as a nominal adjustment.

## V. Conclusion and Recommendation

Prow's contract dispute, as amended, should be denied. The Product Team's contract dispute should be granted, but only to the extent of reducing the contract price by a nominal adjustment of \$1,000. The Product Team's request for more should be denied.

**JOHN A  
DIETRICH**  Digitally signed by  
JOHN A DIETRICH  
Date: 2024.12.03  
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John A. Dietrich  
Director<sup>80</sup> and Chief Administrative Judge  
FAA Office of Dispute Resolution for Acquisition

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<sup>80</sup> The Director is also a Dispute Resolution Officer under the regulation. 14 C.F.R. § 17.3(l) (2024).