Office of Dispute Resolution for Acquisition
Federal Aviation Administration
Washington, D.C.

Contract Disputes of	)	
	)	
Archer Western Contractors, LLC	)	Docket Nos. 15-ODRA-00725,
	)	-00735
Pursuant to Contract No. DTFAEN-10-C-00215	)	

DECISION ON MOTION TO DISMISS AND FOR SUMMARY DECISION AS A MATTER OF LAW

This matter concerns contract disputes ("Contract Disputes") filed by Archer Western Contractors, LLC ("AWC") with the Federal Aviation Administration ("FAA") Office of Dispute Resolution for Acquisition ("ODRA") in connection with a contract awarded by the FAA Western-Pacific Region ("Region") on September 3, 2010, Contract No. DTFAEN-10-C-00215 ("Contract"). The Contract was for the construction of the air traffic control tower ("ATCT") and Terminal Radar Approach Control ("TRACON") at the McCarran International Airport in Las Vegas, Nevada ("the Project"). On April 3, 2015 and June 4, 2015, AWC filed the Contract Disputes which were docketed as 15-ODRA-00725 and 15-ODRA-00735, respectively.

In docket number 15-ODRA-00725, AWC alleges several counts, including breach of contract and breach of the implied duty of good faith and fair dealing. AWC also seeks damages on behalf of itself and its subcontractors, as well as extensions of time for completion. *Notice of Contract Dispute*, dated April 3, 2015 at 2, 8, 14-15. In docket number 15-ODRA-00735, AWC alleges breaches of contract based on the Region's (1) rejection of coated duct and failure to provide an equitable adjustment for duct remediation/replacement; and (2) failure and/or refusal to issue an equitable adjustment for changes to the work scope, which resulted in substantial damages and increased costs. *Notice of Contract Dispute,* dated June 4, 2015 at 3, 6 - 7.

The Region filed a Substantive Response to the Contract Disputes on October 25, 2016, and included within its filing a Partial Motion to Dismiss and for Summary decision in connection with nineteen disputed claim items. 14 C.F.R. §17.31; *Region's Substantive Response, Part 3,* at 1-2 ("Motion").[1] The Motion contends that nineteen claims filed by AWC are untimely, as they were filed more than two years after the accrual date, or, in the alternative, that there are no material facts in dispute, and as a matter of law, a summary decision should be issued based on "pure contract interpretation." *Motion* at 1 – 2.[2] On January 19, 2017, AWC filed a Reply to the Region's Motion ("Reply") and withdrew eleven of the disputed claim items involved. *AWC Reply* at 27-28.[3]

For the reasons discussed below, the ODRA grants in part and denies in part the Region's Motion to Dismiss. More specifically, the Motion is granted as to untimeliness with respect to Proposed Contract Changes ("PCI") 5248 and 5325, Proposed Contract Change ("PCC") 16 and Contract Modification ("Mod") 54/PCI 5227, and denied with respect to Mod 55/PCI 5390. To the extent the Motion seeks summary decision in the alternative for Mod 55/PCI 5390, it also is denied. Additionally, the Motion for summary decision with respect to PCI's 5455 and 5486 is denied.

---

[1] In the Motion, the Region resolves claim item PCI 5363, by agreeing to pay the claimed amount of $1,462.78 to AWC. *Motion* at 16; *Notice of Contract Dispute*, dated June 4, 2015.

[2] The Region expressly states that while claim items Mod 47 and PCI 5478 are briefed in the Motion, they are not included in the Motion's request for dismissal of the nineteen enumerated claim items. *Motion* at 2. The Motion also briefs claim item PCI 5356, but does not identify expressly that it is included or excluded from the dismissal request. *Motion* at 14 – 16. AWC's Reply notes that "it is unclear whether the FAA has moved for summary judgment on all of the claim items listed on page 2 … or only a selected sub-set," and does not appear to address any of these claim items. *Reply* at 2-3. The ODRA's review of the Motion therefore treats PCI 5356 the same as Mod 47 and PCI 5478, i.e., expressly excluded from the dismissal request.

[3] Specifically, AWC's Reply withdrew claim items associated with PCI numbers 5063, 5159, 5170, 5187, 5288, 5365, 5265, 5140, 5298, 5492 and GK COR 127. *Reply* at 27-28. One of the remaining eight items involved the replacement of "Aluminum Windings in Transformers with Copper" in the amount of $117,146.26, and was described by the Region as "newly submitted" on January 15, 2016 based on a document entitled "AWC January 15, 2016 Schedule Analysis and Damages." *Motion* at 26. Because the administrative record contains no other evidence of this claim item, nor any contract dispute filed on January 15, 2016, the ODRA sought clarification from the parties in this regard. *ODRA Letter*, dated May 8, 2017. In a joint response, the parties confirmed only that they disagree as to whether the "January 15, 2016 Schedule Analysis and Damages" document should be included in the evidentiary record. *Joint Letter*, dated May 12, 2017. Accordingly, since that claim item has not been filed as a contract dispute with the ODRA, it will not be addressed further in this decision.

I. Background

The claim items that are the subject of this decision include:[4]

1. PCI 5248 – Electrical changes (tie-in duct bank, over-excavation due to caliche,[5] tunnel second power under storm drainage/remove caliche). $250,429.87
2. PCI 5325 – Add slab edges at ATCT Level. $45,549.50.
3. PCC 16 – TRACON Shaft Wall and Other Items. $8,470,307
4. Mod 54 – PCI 5227, Level 19 Soffits. $133,853.96.
5. Mod 55 – PCI 5390, Power for Added HU-2 and HU-4. $8,053.00.
6. PCI 5455 – Add Conduit for BAS Cat 6 in Lieu of Cable Tray. $4,623.70.
7. PCI 5486 – Remove and Replace Boiler. $331,147.20.

Motion at 3; AWC *Reply* at 27-28.

During the course of contract performance, the above items were the subjects of meetings, written correspondence, AWC requests for information ("RFIs"), proposed contract changes ("PCCs") by the Region, and proposed change items ("PCIs") by AWC. Some of the items were addressed formally in unilateral or bilateral contract modifications; while others were addressed informally through written and oral communications.

The FAA asserts that AWC failed to file the first five claim items at issue within the timeframes established under the ODRA Procedural Regulations, and failed to assert its right to an adjustment as required under the contract "within 30 days after receipt of a written change order." *Motion* at 3, *citing* Changes clause 3.10.1-15(e)(1) J1 0273-0274.[6] The Region also contends that for the sixth and seventh claim items (as well as for a number of the other allegedly untimely claim items) there are no material facts in dispute and thus should be decided by summary decision on the merits in accordance with 17 C.F.R. § 17.31(b). *Motion* at 1-2.

---

[4] *See Notice of Contract Dispute*, dated April 3, 2015 (item 5 above) and *Notice of Contract Dispute*, dated June 4, 2015 at 7 – 8 (items 1 - 4 and 6 - 7).

[5] AWC describes caliche as "sedimentary rock that hardens naturally like cement." *Reply* at 14.

[6] The parties, by agreement, jointly submitted the Dispute File containing relevant documents electronically into the administrative record on October 6, 2016. *Letter, Parties Agreement Re Filings*, dated September 20, 2016. No party has filed an objection to the contents of any exhibit contained in the Dispute File. For ease of reference, this decision cites to the bates stamp numbers of the documents contained in the jointly submitted Dispute File, regardless of whether supplemental copies of those documents were provided in separate exhibits referenced in and attached to briefings on the Motion.

II. Discussion

A. Standard of Review

The Procedural Regulation at 14 C.F.R. § 17.31(a) provides that the ODRA may recommend or order that a contract dispute be dismissed, or that a count or portion thereof be stricken, if it was not timely filed. *Contract Dispute of Astornet Technologies, Inc.*, 08-ODRA-00466 (Decision on Motion for Summary Judgment, dated July 10, 2009). The movant bears the burden of establishing that there are no issues of material fact, and that it is entitled to decision as a matter of law. *Contract Dispute of L&N/MKB Joint Venture,* 12-ODRA-00625 (Decision Denying Motion for Summary Judgment, dated April 9, 2013).

When deciding a motion for summary decision, "the ODRA will consider any material facts in dispute in a light most favorable to … [the non-moving party], and draw all factual inferences in favor of that party." 14 C.F.R. § 17.31(c).[7] When faced with a supported motion for summary decision, the nonmoving party must show evidence of specific facts, as opposed to general allegations, in order to demonstrate a genuine issue of material fact. *Contract Dispute of Siemens Government Services, Inc.*, 08-TSA-040. If, however, the nonmoving party fails to dispute the material facts, then the ODRA may find that the movant has met the high standard of proof required to grant a dispositive motion. *Id.* A motion for summary decision may succeed if it shows "an absence of evidence to support the non-moving party's case." *Consolidated Contract Disputes of Huntleigh USA*, 04-TSA-008 and 06-TSA-025 (Decision Denying Cross Motions For Summary Judgment, March 30, 2009), *citing Celotex*, 477 U.S., at 323, 106 S.Ct., at 2553-2554 (1986).

B. Accrual of a Contract Claim Under the Acquisition Management System

By statute, FAA acquisitions are conducted under the authority of the FAA's Acquisition Management System ("AMS"), and expressly exempt from any acquisition laws that are

[7] If the motion is denied, the claimant must establish on the merits the ODRA's subject matter jurisdiction by a preponderance of the evidence. *Protest of Thomas Co.*, 16-ODRA-00781.

implemented through the Federal Acquisition Regulation ("FAR"), including the Contract Disputes Act of 1978 ("CDA"). *See* Section 348(b)(8) of the Fiscal Year 1996 Department of Transportation Appropriations Act ("1996 Appropriations Act"); Pub. L. No. 104-50, 109 Stat. 435, 450.

The AMS dispute resolution process for contract disputes that arise under FAA contracts is implemented through the ODRA Procedural Regulations. 14 C.F.R. pt. 17 (2017). Under those Regulations, a contract claim becomes a contract dispute when it is filed with the ODRA. 14 C.F.R. § 17.3(h). 14 C.F.R. § 17.3(h) defines a "Contract Dispute" as "a written request to the Office of Dispute Resolution for Acquisition seeking resolution, under an existing FAA contract subject to the AMS, of a claim for the payment of money in a sum certain, the adjustment or interpretation of contract terms, or for other relief arising under, relating to, or involving an alleged breach of that contract." The Regulations further provide that a contract dispute must be filed with the ODRA within two years of the accrual of the contract claim involved. 14 C.F.R. § 17.27(c).

The ODRA Procedural Regulation defines the term "accrual" applied to a "contract claim," as meaning "to come into existence as a legally enforceable claim." 14 C.F.R. § 17.3 (a) and (b). It further defines "accrual of a contract claim" to mean "that all events relating to a claim have occurred, which fix liability of either the government or the contractor and permit assertion of the claim, regardless of when the claimant actually discovered those events." 14 C.F.R. § 17.3 (b). "For liability to be fixed, some injury must have occurred" by inherently knowable facts. *Id.* While 14 C.F.R. 17.3(h) describes a contract dispute as requesting, among other things, "payment of money in a sum certain," the ODRA Regulation regarding "accrual" does not require absolute certainty of the amount claimed, but rather only that it "be capable of reasonable estimation" if any monetary damages have been incurred. *Id.* Moreover, the Regulation that specifically pertains to filing a contract dispute with the ODRA provides that a contract dispute "should contain" a request for a specific remedy, and "the amount, if known, of any monetary remedy requested...." 14 C.F.R. § 17.27(a)(5).

The Contract at issue contains Changes clauses 3.10.1-15, Construction - Construction Dismantling, Demolition or Removal of Improvements clause (July 1996) and 3.10.1-16, Changes and Changed Conditions (April 1996) ("Changes clauses"). *Reply* at 1, J1 00273-00275. The Changes clauses set forth a process for equitably adjusting a contract when the FAA directs a change to the work that affects the cost or duration of performance. More specifically, Contract clause 3.10.1-15 requires the contractor to assert its right to an adjustment for a contract change to the contracting officer within 30 days of the "written or oral order" which "includes direction, instruction, interpretation, or determination" that causes the change "by submitting ... a written statement describing the general nature and amount of proposal...." *Reply* at 1 - 2, J1 00273-00275; *see* Changes clause 3.10.1-15 (b) (c) and (e). Changes clause 3.10.1-16 authorizes the contracting officer to order changes to the contract in writing, but if those changes "increase or decrease the cost of, or time required for performing the work, the contracting officer shall make an equitable adjustment" provided that the required written notice was received or waived by the contracting officer. *Reply* at 1 - 2, J1 00273-00275; *see* Changes clause 3.10.1-16 (a), (c) and (d). Changes clause 3.10.1-16(e) further provides that the failure to agree on a change "shall be a dispute under the 'Disputes' clause." J1 00273-00275. Under the Contract's Disputes clause, "[a] contract dispute against the FAA shall be filed with the ODRA within two (2) years of the accrual of the contract claim involved." Contract clause 3.9.1-1(e); Contract Disputes, J1 0267-0268.

The instant Motion presents an issue of law with respect to when a contract claim accrues under the AMS. AWC contends that all the "events" required for the accrual of a contract claim include the FAA's failure to agree to a requested adjustment, and exhaustion of the administrative process set forth in the Changes clauses. AWC *Reply* at 5 – 6, *citing* Changes clause 3.10.1-16(c). AWC further argues that because its claims are for breach damages, "liability for each claim item was not fixed until the FAA breached the Contract and the FAA did not breach the Contract by ordering or directing changes, as the FAA asserts throughout its Motion." *Reply* at 2. Rather, AWC argues "the [FAA's] breach of the Contract occurred only after it failed to issue a modification for the full cost of each change." *Id.* AWC alleges that the date of accrual was established when the FAA denied AWC's request for an equitable

adjustment and thereby breached the Changes clauses of the contract. *Id.* at 6. AWC's arguments on this point are based on an incorrect premise, i.e., that the denial of a request for an equitable adjustment is a prerequisite to filing an action with the ODRA. AWC's position fails to take into account the difference between the FAR-based and the AMS-based dispute systems.

The key distinction between the AMS and the FAR disputes processes concerns submission of the claim and the final decision maker. Under the FAR, within six years of accrual, a claim is submitted to the contracting officer who issues a decision that is final, unless it is appealed to a board of contract appeals or the Court of Federal Claims.[8] 41 U.S.C. §§606, 609. A board of contract appeals' decision is final as to questions of fact, but can be appealed to the Court of Appeals for the Federal Circuit as to questions of law. *Id.*

In contrast, under the AMS, submission of a contract dispute to the contracting officer and a decision or deemed denial of the claim by the Contracting Officer is not a prerequisite to accrual or the filing of a contract dispute with the ODRA. *Contract Dispute of Siemens Government Services, Inc.*, ODRA 08-TSA-040. The AMS Disputes clause requires only that a contract dispute be filed directly with the ODRA within two years of accrual. Contract Disputes clause 3.9.1-1(e) at J1 0268.[9] For contract disputes that require formal adjudication, the ODRA conducts proceedings pursuant to 14 C.F.R. § 17.33, under which it develops the administrative record, and prepares findings of fact and recommendations to the FAA Administrator for a final order that is subject to review under a highly deferential standard by any U.S. Court of Appeals (except the Federal Circuit). 49 U.S.C. § 46110(d); *J.A. Jones Management Services v. Federal Aviation*

[8] *Williams v. United States*, 118 Fed. Cl. 533 (2014).

[9] Notably, the AMS Disputes clause also requires a copy of the dispute to be provided to the contracting officer and that "[a]fter filing the contract dispute, the contractor should seek informal resolution with the Contracting Officer." Contract Disputes clause 3.9.1-1(f) and (g) at J1 0268. In this regard, the ODRA dispute resolution process allows for a voluntary informal resolution period for the parties to attempt settlement negotiations to resolve the contract dispute either directly, or with the assistance of the ODRA, before a formal adjudication. 14 CFR § 17.29(a); 14 C.F.R Subpart D. It is only when the parties are unwilling or unable to resolve the matter themselves under the auspices of the ODRA that the adjudication will commence. 14 CFR § 17.35(f). This regulatory scheme is consistent with the FAA's statutory mandate and policy to "use voluntary ADR to the maximum extent practicable to resolve matters pending at the ODRA" and promote the "early and expeditious resolution of acquisition controversies." 14 CFR § 17.35(a); AMS §§ 3.1.2 and 3.9.2

Administration, et al., 225 F.3d 761 (D.C. Cir. 2000).[10] The AMS dispute resolution process therefore is more accelerated and streamlined than that of the FAR, inasmuch as it features a shorter period to file a contract dispute from the date of accrual and the initial review of the contract dispute begins at a higher level of final decisional authority.

In addition, the clear and unambiguous language of the Contract does not support AWC's argument that accrual requires exhaustion of the process under the Changes clauses. In particular, it does not condition the right to file a dispute with the ODRA on any actions taken under the Changes clauses. Reading the plain and ordinary language of Change clauses 3.10.1-15 and 3.10.1-16 together results in the following sequence for processing contract changes that become claims during the administration of a contract: (1) the contracting officer orders work in writing that causes performance costs to change; (2) the contractor provides required notice of the change to the contracting officer within 30 days, unless it is otherwise waived by the contracting officer; and (3) if the change causes an increase or decrease in the contractor's costs, the contractor submits a proposal to the contracting officer for an equitable adjustment, but if the contracting officer and the contractor disagree as to any part of the adjustment, it "shall" be treated as a dispute under the "Disputes" clause. *See* Changes clauses 3.10.1-15 and 3.10.1-16 at J1 00273-00275.[11]

In reviewing the issue of accrual of contract claims under 14 C.F.R. § 17.3(a)-(b) and §17.27(c), the ODRA adopts the analysis applied by the Court of Federal Claims and its predecessors, but only to the extent it is consistent with the AMS. *Contract Dispute of Initial Security*, 00-ODRA-00153; *Contract Dispute of Strand Hunt Construction,* 99-ODRA-00142.[12] In determining when liability becomes fixed for purposes of accrual of a contract claim, the ODRA starts by

[10] Under the AMS, the process that leads to an appealable final order in a contract dispute does not occur until after (1) accrual of the contract claim; (2) its timely filing as a contract dispute at the ODRA; (3) the parties' notification to the ODRA that ADR will not result in the settlement of all the issues in dispute; (4) adjudication of the contract dispute by the ODRA; and (5) the issuance of an Administrator's final decision adopting the ODRA's findings and recommendations. 14 CFR § 17.33(a).

[11] It is a well-established fundamental rule of contract interpretation that all parts of a contract must be read together and harmonized if at all possible. *Contract Dispute of Dynamic Security Concepts, Inc.*, 05-ODRA-00346; *Strand Hunt Construction, Inc. 99-ODRA-00142.* Moreover, where the provisions are clear and unambiguous, they must be read in accordance with their plain and ordinary meaning. *Restatement (Second), Contracts* § 202.

[12] While not binding on the ODRA, the decisions of these forums may be viewed as "persuasive authority." *Contract Dispute of Strand Hunt Construction, supra.*

examining the legal basis of the claim. *Appeal of Gray Personnel, Inc.,* ASBCA No. 54652-06-2 BCA 33,378 at 165,475-77 (2006 WL 2390292) (Aug. 9, 2006). Actual damages need not be calculated for purposes of accrual; the fact of an injury simply must be knowable. *The R.R. Gregory Corporation*, 14-1 BCA ¶ 35524, ASBCA No. 58517, 2014 WL 641317. Moreover, accrual of a contract claim does not depend on "when the claimant actually discovered" or "what a party subjectively understood" the events to be relating to a contract claim; rather, the test of accrual depends objectively on what facts were reasonably knowable. 14 C.F.R. § 17.3(a); *United States v. Commodities Export Co.*, 972 F.2d 1266, 1272 (Fed. Cir. 1992); *Gray Personnel*, 06-2 BCA ¶ 33,378 at 165,476 (failure to recognize the causes of increased costs did not suspend claim accrual).[13]

The ODRA also considers the nature of the cause of action underlying the contract claim. *Contract Disputes of Huntleigh USA Corporation; Transportation Security Administration*, 04-TSA-008, 06-TSA-025. In breach of contract claims, the element of breach is "determined by the same rules that have been developed in courts in dealing with constructive change claims." Nash & Cibinic, *Administration of Government Contracts*, *supra.* Thus, for purposes of determining the accrual date of the claim items at issue, it makes no difference whether AWC's claims are styled as a breach of contract, or a request for an equitable adjustment due to a contract change. "[T]he same legal standards are applied to ascertain government liability ... whether the claim is characterized as a breach of contract or constructive change." *Id.* at 459.

The ODRA likewise has stated that breaches of the (1) implied warranty of specifications; (2) duty to cooperate and not hinder contract performance; and (3) duty to correctly interpret the contract specifications are frequently treated as "constructive changes." *Contract Dispute of Strand Hunt Construction*, 99-ODRA-00142; *see also* Nash & Cibinic, Administration of Government Contracts, 4th Ed., at 442, 431. (Defective specifications and failure of the government to cooperate during performance are categories of constructive changes).

[13] For that reason, the ODRA's analysis of accrual does not take into account subjective evidence showing that the claimant may have reasonably believed that the contracting officer's denial of the claim was not final or was being reconsidered. *Raytheon Missile Sys.*, ASBCA No. 58011, 13-1 BCA ¶35,241.

In light of the above discussion, under 14 C.F.R. § 17.3 (a) and (b), accrual of a claim occurs when the facts that give rise to the claim are "reasonably knowable;" thereby making the claim legally enforceable.[14] A breach claim based on a theory of constructive change, therefore, becomes legally enforceable when an FAA contracting officer orders action compelling the performance of work not required by the contract; the contractor's performance of the enlarged duties is not volunteered, the added work causes the contractor "some" injury, and the damages resulting therefrom are susceptible of reasonable estimation.[15] 14 C.F.R. § 17.3 (a)-(b); § 17.27(a)(5).

C. Claim Items Untimely Filed

In rendering this decision, the ODRA relies on the evidence contained in the jointly submitted Dispute File to the extent that it is undisputed and relevant to the issues raised herein. The ODRA also considers any material factual disputes in a light most favorable to AWC.

1. PCI 5248 – Electrical changes (tie-in duct bank, over-excavation due to caliche, tunnel second power under storm drainage/remove caliche).

AWC alleges that the FAA has "wrongfully failed and/or refused to recognize" this PCI as a change in the work. *Notice of Contract Dispute*, dated June 4, 2015 at 7, ¶ 35. The Region contends that this claim item is "time barred." *Motion* at 9. As discussed below, the ODRA finds that the claim accrued, at the latest, prior to June 4, 2013. Accordingly, inasmuch as this Contract Dispute was not filed with the ODRA until June 4, 2015, i.e., more than two years from

[14] Accordingly, a contract claim arises and accrues *before* it can be presented to the contracting officer as a request for an equitable adjustment, and *before* any disagreement arises as to the amount of the adjustment. Although revisions of PCIs may expand or develop further the *scope or degree* of injury claimed, but they do not extend the date of claim accrual. Likewise, the fact that performance of the changed work was done on a Time & Materials ("T&M") or Not-to-Exceed ("NTE") basis does not prevent a contractor from reasonably knowing of, and estimating the damages that result from a change. *See Reply* at 8.

[15] Notably, the elements of proof for a constructive change are as follows: (1) the government compelled the contractor to perform work not required by the contract; (2) the government official directing the change had authority to alter the contractor's duties under the contract; (3) the contractor's duties were enlarged; and (4) the added work was not volunteered but resulted from the direction of an authorized government official. *The R.R. Gregory Corporation*, 14-1 BCA ¶ 35524, ASBCA No. 58517, 2014 WL 641317.

when it accrued, it is dismissed as untimely. *Notice of Contract Dispute*, dated June 4, 2015 at 7, ¶ 35.

a. The Evolution of PCI 5248 Overall

AWC submitted PCI No. 5248 to the Region on January 20, 2015 in revised form after having submitted an initial version of this PCI almost 21 months prior. *Reply* at 13; J34 0720-0757. AWC asserts that because "the degree of injury was not known" a final version was "not submitted until later." *Reply* at 13. AWC explains: "PCI 5248 includes three cost elements, each of which is for additional excavation to avoid existing, unknown utilities and to accommodate changes in the design." *Reply* at 14.

According to AWC, "[t]he first area of additional excavation occurred at the southeast corner of the Project for the communication ductbank" and involved changed work resulting from Revised Drawing No. E120, Rev. B, dated August 22, 2011, note 28, DF J34 0761. *Reply* at 14; J34 0821-0863 at 0828. Also according to AWC, PCI 5248 involved "additional excavation to avoid existing, unknown utilities and to accommodate changes in the design." *Id.* As a result, AWC and its subcontractors "tracked the additional excavation," which was "complicated by the laborious removal of caliche ... in quantities much greater than planned and tunneling under existing utilities that were not indicated in the Contract Drawings." *Reply* at 14; *citing* J34 0762 and A2 0013-0016.

AWC further asserts that the event "triggering" the change resulting in PCI 5248 was a direction from the Region on November 1, 2011. *Reply* at 13, *citing* A2 0011 – 12.[16] The undisputed record shows that on November 1, 2011, the Region directed that "the conduits should be installed under the water lines." *Id.*[17]

---

[16] AWC contends that that the change actually was identified even earlier than November, 2011, based on emails in the record, dated July 22 and August of 2011, relative to the secondary power feed design. *Reply* at 15, *citing* A2 0013-16. According to AWC, the Region admitted in these emails, that "[e]xtending the duct bank under the newly constructed water would be an issue at this point *especially at that depth*." *Id.* (emphasis added).

[17] The record shows that this direction was provided in response to an email, dated October 31, 2011, from WH Pacific "about potentially taking the communication line from the AOA in the southeast corner of the site and routing it over the 6" and 12" waterlines that have been installed." *Id.* The WH Pacific email explained:

> This communication line is the same one we have argued with the contractor about his work sequence. We have updated the plans previously and show the communication duct bank going under the waterlines and these are shown on the attached plans LAS-E-ATCT-C504-Rev B and

AWC states that it performed the work and tracked the costs for the communication duct bank changes before submitting PCI 5248. *Reply* at 14. The additional work that resulted from revised Drawing E120 included "saw cutting approximately 35 feet of asphalt, excavating approximately 50 feet of earth to 6- 8 feet deep, removing caliche from 4 – 8 feet below grade for approximately 30 feet of trench, installing approximately 150 feet of 4" PVC with necessary connectors, and encasing the PVC in concrete and backfilling the trench." *Id.*

AWC's revised PCI No. 5248 incorporates three successive change requests to increase the contract amount based on additional excavation work:

> $34,760.00 for Part I – Fisk Electric COR – Tie In Duct Bank
>
> $39,794.00 for Part II – Fisk Electric COR – Over Excavation Secondary Power
>
> $128,717.00 for Part III – Fisk Electric COR – Over Excavation Electrical Scope

AWC *Reply* at 14, J34 1048 – 1050.

Each part of PCI 5248 is discussed below, in turn.

b. Part I

Part I of PCI No. 5248 was submitted to the Region on April 6, 2013 as a change order request on behalf of AWC's subcontractor, Fisk Electric, seeking an increase of $34,760.00. J34 0720-0757. Part I pertained to work identified as "Communication Tie-In duct Bank – E120 Rev B: Changes from E120 Rev 0 to B," which AWC described as follows:

1. Saw cut approximately 35 feet of asphalt
2. Approximately 50 feet of excavation 6 to 8 feet deep
3. Caliche removal from 4 feet deep down to 8 feet deep for approximately 30 feet of the trench
4. Install approximately 150 feet of 4" PVC with (6) 22 degree rigid elbows
5. The conduit was then inspected, encased in concrete and backfilled.

J34 0720-0757

LAS-E-ATCT-E120-Rev B. Due to the nature of the soils and the problems with digging under the waterlines now, the question came up on whether we could 45 up and over the waterlines and decrease the depth of bury.

Id.

The undisputed record contains documents provided by Fisk Electric to AWC in support of Part I. J34 0725, 0821-0863. These documents reflect breakdowns of costs, activities, dates, equipment, and labor hours as well as invoices submitted for the additional work claimed. *Id.* The supporting documents show that the $34,760.00 amount requested by Fisk for "Communication tie in ductbank" includes $24,380.00 for caliche removal work performed by its subcontractor, Lone Mountain Excavation. *Id.* The latter amount is supported by invoices expressly identified as being "Extra to Contract." J34 0731-0751.[18] These documents further show that this work was performed from November 29, 2012 through January 10, 2013. J34-0728 – 0729.

c. Part II

Part II of PCI No. 5248 seeks an increase of $39,794.00 that is based on a proposed change order request submitted to AWC by Fisk Electric on October 2, 2014 for "Added Depth at Secondary Duct Bank/Caliche Removal." J34 0932-1047. In the letter, Fisk indicates that the additional amount requested includes "full credit for excavation associated with PCC11."[19] *Id.* at J34 0933. As to Part II, the undisputed record contains another letter, dated October 7, 2014, asserting that "[t]he change that Fisk has estimated for the secondary power is for the work required beyond the change of direction of the original design." J34 0932. Also included in support of the

---

[18] In support of Part I, the undisputed record contains a letter dated August 7, 2014 to Fisk from Lone Mountain Excavation regarding its invoices totaling $24,380.00 relative to the "Communication tie in ductbank" work, and describing the extent of its efforts. J34 0822, 0835. That letter states:

> [T]he existing communications ductbank termination was revised per drawing LAS-E-ATCT-E120 Rev. B dated 8-22-2011 .... Lone Mountain Excavation was instructed to track the additional work on time and material tickets .... During the excavation of the additional communication trenching Lone Mountain Excavation faced multiple hurdles including hoe ramming caliche ... and tunneling under existing utilities with chipping guns due to the caliche layer that the existing utilities rested on ....

J34 0828.

[19] Notably, the "credit" referenced in PCC 11 relates to a design change that occurred previously on February 7, 2012. J26 0251-0252. The undisputed record shows that the Region issued PCC 11, in accordance with the changes clause of the Contract, to change the design of "Secondary Power & Communication Infrastructure" based on revised drawings. The design change affected the installation of the utility trench, conduit and concrete encasement. AWC submitted PCI No. 5057 on May 4, 2012 in response to PCC 11. J34 0096-0110. The evidence in the undisputed record shows that pricing proposed for PCC 11 includes a quote from AWC's subcontractor, Fisk Electric, specifically identifying an amount of $65,925.00 for "Trenching/Backfill (Caliche)." J34 0104 and 0113. Subsequently, on August 8, 2012, the Region issued bilateral Contract Modification No. 16, which provided a "complete equitable adjustment" for PCC 11, and expressly referenced PCI No. 5057, among others. J2 0048-0050.

$39,794.00 request is a letter, dated September 24, 2014, from Fisk's subcontractor, Lone Mountain Excavation, describing the additional caliche excavation it performed, as well as cost invoices for "All Outstanding T&M Caliche Tickets for Primary & Comm" showing that the work was performed from September 29, 2011 through November 21, 2012. J34 0938 – 0939.

d. Part III

Part III of PCI No. 5248 seeks an increase of $128,717.00 by AWC on behalf of Fisk Electric. The undisputed record shows that, by letter dated October 2, 2014, Fisk Electric submitted a change order request regarding "Caliche Removal/Over Excavation," claiming, on behalf of Lone Mountain Excavation, that "additional excavation ... was required for the installation of the Secondary duct banks," and that "added depths were required because of conflicting unknown existing utilities and field changes. . . ." J34 0864-0951 at 0869.

The letter from Fisk Electric explains that "Lone Mountain as the subcontractor to Fisk Electric has prepared an extensive log showing areas where caliche in excess of contract documents was over excavated ... and a timeline showing how the work progressed. As discussed in previous meetings the soils reports did not show caliche at the depths called for on bid set drawings." J34 0864. Included along with supporting documentation for Part III is a letter, dated September 24, 2014, from Lone Mountain Excavation to Fisk Electric, describing the additional excavation of caliche required for installation of the Secondary duct banks that "was not accounted for based on the original bid documents." J34 0869.

The undisputed record also contains supporting documents for the requested change order. These consist of invoices from Lone Mountain Excavation submitted to Fisk Electric for the caliche removal work, identified as being "Extra to Contract." J34 0872-0902. These invoices show that Lone Mountain Excavation performed the work for "All Outstanding T&M Caliche Tickets for Secondary Power" from August 27, 2012 through October 5, 2012. J34 0870 – 0871.

The ODRA finds that the facts alleged by AWC, along with the documents in the undisputed record, show that the triggering event of the change that gave rise to PCI 5248 occurred at least as early as November 1, 2011, when the Region directed AWC to install the conduits under the water lines. *Reply* at 13, A2 0011-12. As of that date, AWC reasonably knew that it had suffered at least "some" injury as result of the FAA's direction and it performed the changed

work with the expectation of a contract adjustment, inasmuch as it tracked the additional costs it incurred. *Reply* at 14. Moreover, the undisputed record shows that the last of the excavation work was completed by January 10, 2013, at which time the damages suffered as a result of the changed work could have been quantified, or at a minimum estimated. J34 0870 – 0871, J34 0938 – 0939, and J34 0728 – 0729.

The undisputed record shows that accrual of this contract claim occurred more than two years prior to June 4, 2015, i.e., the date the dispute was filed with the ODRA. As such, it is untimely and must be dismissed.[20]

2. PCI 5325 – Add slab edges at ATCT Level.

AWC filed this claim in the amount of $45,549.50 as a Contract Dispute with the ODRA on June 4, 2015. *Notice of Contract Dispute*, dated June 4, 2015 at 8, ¶ 35. AWC argues that "the claim did not accrue until the FAA failed to agree to an equitable adjustment" which was the same day AWC submitted its proposal for an adjustment under the Changes clause on September 6, 2013. *Reply* at 15, *citing* J34 1274-1293.

The Region contends that this claim item is "time barred." *Motion* at 13. For the reasons discussed below, the ODRA finds that the claim accrued more than two years prior to June 4, 2015, i.e., the date the Contract Dispute was filed with the ODRA. Accordingly, this part of the Contract Dispute was not timely and must be dismissed.

In the Reply, AWC does not dispute the "chronology of facts from August 2012 through September 2013," set forth in the Region's Motion. *Id.*; *Motion* at 13-14. These facts, as well as

[20] The Region in its Motion argued that the work at issue in PCI 5248 was addressed in bilateral Modification 16, which provided a "complete equitable adjustment" for PCC 11 relative to the design changes to the secondary power and communication infrastructure. *Motion* at 9. AWC countered that "[n]owhere within Modification No. 16 is PCI 5248 addressed," and "whether Modification No. 16 covers the work that was performed later under PCI 5248 is a material fact that the FAA has failed to show is not in dispute in its Motion." *Reply* at 13-14, J20048-50. The ODRA finds it unnecessary to determine whether the work associated with PCI 5248 was addressed as part of Modification No. 16, given the facts as alleged by AWC and the documents in the undisputed record. *Reply* at 13-14.

the undisputed record, show that AWC submitted RFI 652 on August 13, 2012, regarding a design issue:

> The location of the track in relation to the slab edge is inconsistent. There are locations where only 3" of the 6" track will bear on the slab. This creates an issue with both bearing and attachment of the track to the concrete with PAF at minimum 3" from the slab edge. Is it acceptable to have only 3" of track bear on the slab? Is it acceptable to attach the PAF at 2-1/2" from the slab edge?

J27 0032-0071.

The Region's response on August 30, 2012, provided "two new sketches, SK 060 and SK061, detailing the installation of bent plates at Levels 19 and 20 where the slab edge was not flush with the exterior fact of the steel stud framing." *Reply* at 17. The Region's response also stated "[i]t is not acceptable to have only 3" of track on the slab or to attach the PAF at 2.5" from the slab edge" and "[n]o additional costs to FAA will be associated with this RFI." J34-1286. AWC states that the Region's August 30, 2012 response "triggered application of the changes clauses." *Reply* at 15. AWC further explains that because "the new sketches required work different from the Contract Documents (i.e., a change in the Work)," it submitted PCI No. 5325 on September 6, 2013. *Reply* at 17; J34 1274-1293.

The undisputed record further shows that supporting documents provided with PCI No. 5325 include a change order request to AWC from Union Erectors, LLC, dated November 1, 2012, which states:

> Per RFI 652, Union Erectors was directed to proceed with additional work to Level 19 & 20 slab edges as to provide attachment point for exterior trades. Material and installation as per sketch SK061. The cost incurred as seen in this change order request is reflective of this work. Archer Western Contractors had agreed to cover half of the incurred cost as to maintain progress and schedule.

J34 1276. Also included with Union Erectors' change order request are copies of invoices submitted to AWC from Union Erectors, LLC for the changed work, which are dated October 8 – 17, 2012. J34 1278 – 1285.

The ODRA finds, based on these undisputed facts, that the contract change occurred on August 30, 2012, when the Region's direction and sketch provided in response to RFI 652 required AWC to perform changed work and, as AWC admits, "triggered" the process for seeking an equitable adjustment under the Changes clauses for increased costs of the change. *Reply* at 15. As of November 1, 2012, AWC had received a change order request from its subcontractor for the additional work. J34 1276.

The undisputed facts show that prior to June 4, 2013, the fact of "some" injury resulting from the August 30, 2012 change was reasonably knowable to AWC, damages were susceptible of reasonable estimation and that all events relating to the claim had occurred, fixing liability permitting assertion of the claim. 14 C.F.R. §17.3(a) - (b). The undisputed record shows that this claim accrued more than two years before the Contract Dispute was filed with the ODRA. It therefore is untimely and must be dismissed.

3. PCC 16 – TRACON Shaft Wall and Other Items.

AWC filed the above claim item, PCC 16, Equitable Adjustment of Significant Design Modification, as a contract dispute on April 3, 2015. *Notice of Contract Dispute*, April 3, 2015. AWC argues that the Region's failure to agree to an equitable adjustment on December 16, 2013 marks the date that this claim item accrued. *Reply* at 10, *citing* A2 0184-0185, J26 0547. The Region contends that this claim item is "time barred." *Motion* at 20. For the reasons discussed below, the ODRA finds that the claim accrued more than two years before April 3, 2015, i.e., the date this claim was filed with the ODRA as a Contract Dispute.

As explained previously, the ODRA's analysis of the issue of accrual is fact specific for each claim item. *See* Section B at 5 – 10, *supra*. The undisputed facts show that on October 26, 2012, AWC submitted an RFI to the Region, "advising that the mechanical shaft wall system in TRACON, as designed, could not be constructed," and AWC "suggested a few options for correcting this defect in the design." *Notice of Contract Dispute*, April 3, 2015 at 3; ¶8. Following that request, the Region advised AWC that substantial design changes would be forthcoming for AWC to analyze and price. *Id.* at ¶9. Also, according to AWC, "[i]n the

meantime, electrical, plumbing, mechanical and partition construction activities that would likely be affected by changes in the mechanical shafts was ongoing and, despite requests by Archer Western to the FAA to cease all affected work, the FAA ignored those requests and provided no direction." *Id.* at ¶10.

On December 26, 2012, the Region issued PCC 016 providing construction details for 18 items of change, including "substantial life safety and mechanical changes in the TRACON building, changes to wall assemblies in Levels 20 and 21 of the ATCT, and revisions to mechanical ductwork that would require removal of the ATCT roof at Level 21." *Id.* ¶11. In response, AWC advised the FAA in a letter dated December 27, 2012 that the changes proposed in PCC 016 would cause it to "incur additional costs and critical path schedule impacts." *Id.* ¶12. AWC asserts that it "advised the FAA that the changes were currently being priced by Archer Western and its subcontractors ... [and] notified the FAA that to avoid costly demolition of new work, Archer Western would be evaluating ongoing work that might be affected ...." *Id.* ¶12. According to AWC, it "ordered its metal studs and drywall subcontractor to cease further installation ... in the interest of mitigating the costs associated with PCC 016 changes even though ceasing the work in the meantime adversely impacted the critical path of the schedule." *Id.* ¶15.

Communications continued between AWC and the Region in this regard, and they met on January 23, 2013 to resolve additional details of the PCC 016 changed work as well as discuss the anticipated costs of implementing the changes. *Id.* at 3-4 ¶¶13-16. On February 7, 2013, AWC submitted to the FAA PCI 5172, which "provided an estimate of $2,565,165.76 for the direct costs of performing the changes prescribed in PCC 016 along with Time Impact Analysis ("TIA") 6" in support of a time extension of 146 calendar days. *Id.* at 4; ¶17. Subsequently, by letter of March 1, 2013, AWC advised the Region that "since it had not received a Contract Modification authorizing PCC 016 work, the 126 calendar day delay set forth in previously-submitted TIA 6 must be extended as would its associated time-related/general conditions costs." *Id.* at 5, ¶20.

The ODRA finds that the contract change occurred when the FAA issued PCC 016 on December 26, 2012 to AWC directing the substantial design changes at issue. The undisputed record shows that AWC considered this additional work to be a contract change, tracked the cost increases and delay associated with the changed work in order to quantify the impact, and expected the contract to be adjusted accordingly under the Changes clause. On February 7, 2013, AWC submitted to the FAA PCI 5172, providing an initial estimate of the cost of the change, and demonstrating that, by that time, the fact of "some" injury was reasonably knowable to AWC, damages could be reasonably estimated and all events relating to the claim had occurred, fixing liability and permitting assertion of the claim as a contract dispute. The undisputed record further shows that AWC failed to timely file this claim as a contract dispute with the ODRA, inasmuch as accrual of this claim item occurred more than two years prior to April 3, 2015, when it was filed. 14 C.F.R. § 17.3(a) and (b).[21]

4. Mod 54 – PCI 5227, Level 19 Soffits.

AWC filed the above claim in the amount of $133,853.96 as a contract dispute with the ODRA on June 4, 2015. *Notice of Contract Dispute*, June 4, 2015. AWC alleges that the Region wrongfully issued Unilateral Modification No. 54 and granted an insufficient equitable adjustment for PCI 5227. *Id.* at 7, ¶34.[22] AWC's Reply does not dispute the Region's chronology of facts from January 2013 through December 2014 set forth in its Motion, but asserts that accrual of this claim item occurred on December 30, 2014 when the Unilateral

[21] Moreover, actions taken by the parties pursuant to the Changes clauses did not change the date when the claim accrued. It does not matter that the Region issued a Unilateral Contract Direction on March 7, 2013, "authorizing Archer Western to proceed with all 18 items of work contained in PCC 016." *Notice of Contract Dispute,* dated April 3, 2015 at 5 ¶ 21. Nor does it matter that the Region "advised that it would soon be issuing a formal contract modification" increasing the Contract price and changing the Contract completion date. *Id.* Nor does it matter that on March 8, 2013, AWC requested that the Region reconsider its decision as to the modification amount and calendar days added to the schedule. *Notice of Contract Dispute,* dated April 3, 2015 at 5-6 at ¶ 22; J26 0550. Nor does it matter that on March 26, 2013 the Region issued unilateral Modification 26, which among other things, failed to address all of the items in PCC 16 and allowed an amount "no greater than $225000 for 'Undefinitized Costs for Additional Time.'" *Notice of Contract Dispute,* dated April 3, 2015 at 6, ¶26, J2 0079-0083. Although these actions were taken by the parties pursuant to the Changes clauses in an attempt to reach agreement on an equitable adjustment, they did not toll, or otherwise extend the time limitation for accrual and filing a claim as a contract dispute with the ODRA, as set forth in 14 C.F.R. § 17.3(a) and (b); § 17.27(c).

[22] According to AWC, the Region's unilateral modification provided "only 17% of the total actual cost" of performing the changed work, with the Region arguing a lack of coordination on the part of AWC. *Reply* at 23.

Modification was issued. *Reply* at 20-21; J2 0249-58. The Region asserts that this claim item is "time barred." *Motion* at 23. For the reasons discussed below, the ODRA finds that the claim accrued more than two years before the date the Contract Dispute was filed with the ODRA. Accordingly, this claim is dismissed as untimely.

The undisputed record shows that on January 24, 2013, AWC issued RFI 894 identifying a lack of ceiling space between the bottom of building steel (with fireproofing) and the metal deck to install fire protection piping and plumbing lines without affecting the design height of the ceilings. J27 0128-0131. The Region responded on March 7, 2013 with a sketch adding soffit locations. *Id.* On March 26, 2013, the FAA issued a revised response adding more soffits. J27 0132-0137. On April 9, 2013, the FAA provided a second revised response to RFI 894, with sketches with framing and drywall details. J27 0138-0146.

On May 16, 2013, AWC submitted PCI 5227 to the Region's direction to perform "additional work not included in the original contract." *Reply* at 23. The additional work arose from the revised design and addition of a soffit for piping, which according to AWC "triggered additional costs ... which were tracked and collectively submitted" in PCI 5227. *Reply* at 23, *citing* J34 0369-0544.

The undisputed record also shows that AWC submitted a proposal for an equitable adjustment for RFI 894 under the Changes clauses initially on May 16, 2013, and then revised it on January 13, 2014 upon completion of the work. *Reply* at 21, J34 0369-0544, J34 0583-0719. The Region argues that the claim accrued on the date of the second revised response to RFI 894, i.e., April 9, 2013, while AWC argues that this is the date of the event triggering the change to the contract. *Motion* at 24; *Reply* at 21.

The ODRA finds that the Region directed the contract change on April 9, 2013 when it provided the last revised response to RFI No. 894, thus, triggering the changes at issue. *Reply* at 21. The undisputed record further shows that AWC treated this work as a change, and tracked the cost increases and delays associated with the change to quantify its impact. *Reply* at 23. The undisputed record shows that on May 16, 2013, AWC submitted a proposal for an equitable

adjustment to the Region for the change. *Reply* at 21. The May 16th proposal submission demonstrated that, by that time, the fact of "some" injury was reasonably knowable to AWC, damages could be reasonably estimated and all events relating to the claim had occurred, fixing liability and permitting assertion of the claim as a contract dispute. The undisputed record shows that AWC failed to timely file this claim, inasmuch as it accrued more than two years before the Contract Dispute was filed with the ODRA. 14 C.F.R. § 17.3(a) and (b).

5. Mod 55 – PCI 5390, Power for Added HU-2 and HU-4.

AWC filed the above claim in the amount of $8,053.00 as a contract dispute with the ODRA on June 4, 2015. *Notice of Contract Dispute*, June 4, 2015. AWC alleges that the Region wrongfully issued unilateral Modification 55 granting an insufficient equitable adjustment for this changed work. *Id.* at 7, ¶ 34. AWC's Reply does not dispute the chronology of facts from May 2012 through January 2015 set forth in the Region's Motion with respect to the PCI 5227 claim item, but asserts that accrual of this claim item occurred on January 21, 2015 when the unilateral modification was issued. *Reply* at 24, J2 0259-64.

The Region asserts that this claim item is "time barred." *Motion* at 25. For the reasons discussed below, the ODRA finds that the claim accrued after June 4, 2013, and, thus, was timely filed with the ODRA as a contract dispute.

According to AWC, the Region changed the power circuitry specified in the Contract when it made changes to the types and quantities of humidifiers and the pipe runs. *Reply* at 25, J34 1356. The undisputed record shows that on May 14, 2012, AWC submitted RFI 529 identifying an issue with the design of the humidification system. *Motion* at 25, J27 0018. The RFI proposed using a single humidifier for each air tunnel, and stated that the "[c]ost impact will depend on the solution provided." J27 0018. On July 12, 2012, in response to the RFI, the Region directed AWC to replace one large humidifier with four smaller units and to shorten the pipe runs. J27 0019-0030; J34-1356. Subsequently, on July 19, 2013, the Region revised its response to RFI 529, by adding that "HU-3 shall be feed [sic] from a 30 amp, 3 pole feeder breaker in EMCCB, not a 30A breaker in Panel EDPHB." J27 0005. According to AWC, it performed the changed

work for RFI 529 with its subcontractor, and they "tracked their actual costs." *Reply* at 25, J34 1357-61.

The undisputed record shows that AWC submitted PCI 5334 regarding the relocation of "HU-3 pnl EDPHB-EMCCE" pursuant to RFI 529 to the Region on September 17, 2013. J2 0147 - 0149. Then, on April 8, 2014, AWC submitted PCI 5390 requesting the amount of $19,345.00 for "RFI 529R – Remaining cost from PCI 5334." J34 1358, 1362-1367. PCI 5334 eventually was the subject of negotiated bilateral Modification 46, effective June 6, 2014. The bilateral modification provided $5,618.00 for PCI 5334 work which it described as: "Relocate circuit for HU-3 from EDPHB to EMCCB (RFI 529)." J2 0146 – 0149. The remainder of the work that was identified in PCI 5390 is the subject of unilateral Modification 55, as well as this claim item. *Motion* at 25; J34 1373-1375.

According to AWC, the costs it submitted for PCI 5390 were its "actual costs," but the Region "paid only a portion of the costs actually incurred (Modification No. 55) by ignoring the changes necessary to the circuitry to supply power as-planned vs. as-built and, thereby, leaving a balance due." *Reply* at 25, J34 1357-61.[23] On January 21, 2015, the Region unilaterally issued Modification 55 in the amount of $11,292.00 for this work. J2 0259-0263. Thus, AWC's claim is for the difference between its claimed amount and the amount paid by the Region, or $8,053.00.

The undisputed record shows that the Region directed the change in its response to RFI 529 on July 12, 2012, and then revised its response on July 19, 2013. J27 0005, 0019-0030; J34-1356. AWC's RFI expressly states the "[c]ost impact will depend on the solution provided," and the record shows that the final solution was not provided until July 19, 2013 when the Region issued its revised response to RFI 529. J27-0005. Accordingly, this claim item was timely filed with the ODRA on June 4, 2015 as a contract dispute, since it accrued after June 4, 2013. 14 C.F.R. §17.3(b). The Region's Motion to dismiss this claim item as untimely therefore is denied.

[23] According to the Region, it estimated that the cost for the work is $9,600.00, which was less than what was proposed by AWC because AWC's estimate allegedly failed to include a credit for the existing circuit, circuit breakers and disconnect switch, and also overestimated the length of the circuit. *Id.*

D. Summary Decision as a Matter of Law

Pursuant to the ODRA Procedural Regulations, upon a motion by a party, or acting on its own initiative, the ODRA may exercise its discretion to issue a summary decision in whole or in part in a matter. *See* 14 C.F.R. §17.31(b). The ODRA also has held that summary decision as a matter of law is proper where the parties have been permitted an adequate time for discovery and the record shows no genuine issue as to any material fact and entitlement as a matter of law. *Contract Dispute of Astornet Technologies, Inc.*, 08-ODRA-00466 (Decision on Motion for Summary Judgment, July 10, 2009).

When faced with a supported motion for summary decision, the nonmoving party must show specific facts, as opposed to general allegations, in order to demonstrate a genuine issue of material fact. *Contract Dispute of Siemens Government Services, Inc.*, ODRA 08-TSA-040; *Contract Dispute of Astornet*, supra. Where the nonmoving party fails to dispute the material facts alleged by the moving party, the ODRA may find that the movant has met the high standard of proof required to grant a dispositive motion. *Id.* In addition, "'the question of interpretation of language, the conduct, and the intent of the parties, i.e., the question of what is the meaning that should be given by a court to the words of a contract, may sometimes involve questions of material fact and not present a pure question of law.'" *Contract Dispute of Siemens Government Services, Inc.*, ODRA 08-TSA-040, *citing Crown Laundry and Dry Cleaners, Inc. v. United States*, 29 Fed.Cl. 506, 515 (1993).

1. Mod 55 – PCI 5390, Power for Added HU-2 and HU-4.

As discussed previously, the ODRA denied the Region's Motion to dismiss this Contract Dispute for untimeliness. *See supra*, Decision Section C, Part 5. To the extent that the Region alternatively argues that it should be summarily decided as a matter of law, ODRA finds AWC has shown specific evidence reasonably demonstrating the existence of genuine issues of material fact. *Motion* at 25-26; *Reply* at 24-25. Inasmuch as discovery is ongoing and the administrative record is developing, AWC still could submit relevant evidence on this issue.

Reply at 3, F.N. 1. Accordingly, this claim is not ripe for summary decision as a matter of law and the Region's request on this basis also is denied.

2. PCI 5455 – Add Conduit for BAS Cat 6 in Lieu of Cable Tray. $4,623.70

AWC alleges that the FAA has "wrongfully failed and/or refused to recognize" PCI 5455 as a change in the work. *Notice of Contract Dispute*, dated June 4, 2015 at 7-8, ¶35. The Region contends that summary decision is appropriate for PCI 5455 because it involves "work already included in the contract, per Contract Amendment No. 003." *Motion* at 17. The evidence cited by the Region is an amendment to the contract specifying that all low voltage wiring within the buildings must be installed in conduit. *Id.* at 18, J1 0063. The Region argues that "[a]s Contract Amendment No. 003 required all low voltage wiring to be installed in conduit, AWC's claim for installing the low voltage BAS wire in conduit should be denied. " *Id.*

AWC, in its Reply, argues that "this claim item is not ripe for summary judgment as there are disputed facts over the conflict created between Contract Amendment No. 003, Question 30 ... and Specification § 23 09 23, Part 2.4(B) when the FAA failed to provide conformed specifications, as is customary to reconcile contract amendments with pre-bid specifications." *Reply* at 17. AWC further cites to communications from, and conduct by the Region that had a bearing on how AWC reasonably interpreted the Contract terms. *Reply* at 18. AWC also points to language in the specification that supports an alternative interpretation that Cat6 cables could be installed in raceways. *Id.* AWC argues in this regard that "there exists a dispute of material fact over interpretation of the specification over whether conduit was necessary under the Contract terms and as-applied during the Project (i.e., whether the FAA issued a constructive change)." *Reply* at 18.

Based on the above, the ODRA finds AWC has proffered specific evidence reasonably demonstrating the existence of a genuine issue of material fact. Moreover, discovery still is ongoing and development of the administrative record is not complete. *Reply* at 3, F.N. 1. AWC still could submit additional relevant evidence on this issue. As such, this claim item is not ripe for summary decision. Accordingly, the Region's Motion is denied.

3. PCI 5486 – Remove and Replace Boiler. $331,147.20.

AWC alleges that the FAA has "wrongfully failed and/or refused to recognize" PCI 5486 as a change in the work. *Notice of Contract Dispute*, dated June 4, 2015 at 7-8, ¶35. AWC is seeking an additional $330,681.17, and a contract extension of 14 days for replacing the boilers.

The Region contends that summary decision is appropriate for PCI 5455, and sets forth numerous detailed facts with citations to the record in support of its position that boilers installed by AWC "came contaminated with chloride or became contaminated with chloride while in the care of AWC; and since the failure occurred while the units were in the care of AWC, the responsibility and liability lies with AWC, not the FAA." *Motion* at 20. AWC argues that this claim item is not ripe for summary decision, and, that when the facts are viewed in a light most favorable to AWC, there is a genuine issue of material fact as to the cause of the corrosion. *Reply* at 19.

AWC also asserts that "only reports produced by third-parties for the FAA are available," and that it "has not had the opportunity as part of this Disputes process to prepare or provide investigatory reports from its own third-party agencies to determine or opine on causation." *Reply* at 3, F.N. 1 and 19. AWC further cites to specific facts in the record in support of its position that the Region bears the responsibility for the corrosion due to a flawed flue design, and that the Region's direction to replace the entire boiler was improper. *Reply* at 20.

Based on the above, the ODRA finds AWC has proffered specific evidence reasonably demonstrating the existence of genuine issues of material fact. Inasmuch as discovery still is ongoing, and the administrative record still is developing, AWC could submit relevant evidence on this issue. As such, the claim is not ripe for summary decision and the Region's Motion is denied.

III. CONCLUSION

For the reasons set forth above, the Region's Motion to dismiss for untimeliness is granted with respect to PCI 5248, PCI 5325, PCC 16 and Mod 54/PCI 5227. The Region's Motion for summary decision is denied with respect to PCI 5455 and PCI 5486, and with respect to Mod 55/PCI 5390, the Region's Motion to dismiss for untimeliness, or alternatively, for summary decision is denied.[24]

Marie A. Collins
Dispute Resolution Officer and Administrative Judge
FAA Office of Dispute Resolution for Acquisition

June 8, 2017

[24] This is an interlocutory Order. It will become final and appealable upon issuance of an Administrator's order at the conclusion of this case.