UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

DENIED: March 28, 2023

CBCA 7319

SAGE ACQUISITIONS LLC,

Appellant,

v.

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT,

Respondent.

Michael R. Rizzo, Kevin J. Slattum, and Aaron S. Ralph of Pillsbury Winthrop Shaw Pittman LLP, Los Angeles, CA, counsel for Appellant.

Blythe I. Rodgers, Jose A. Montalvo-Rodriguez, Julie A. Holvik, Justin D. Haselden, and Julie K. Cannatti, Office of General Counsel, Department of Housing and Urban Development, Washington, DC, counsel for Respondent.

Before Board Judges **LESTER**, **SHERIDAN**, and **CHADWICK**.

SHERIDAN, Board Judge.

Appellant, Sage Acquisitions LLC (Sage), seeks costs from the Department of Housing and Urban Development (HUD or agency) for HUD's termination for convenience of three contracts as well as an alleged breach of a related bridge contract awarded during the pendency of a bid protest. The parties elected, pursuant to Board Rule 19 (48 CFR 6101.19 (2021)), to have this matter decided on a record submission without a hearing.

Before addressing entitlement, we find that, because Sage's termination settlement proposal ripened into a claim before Sage filed this appeal and the certified claim is stated in a sum certain, we possess jurisdiction to entertain this appeal. With regard to Sage's

entitlement to termination settlement expenses, the Asset Management (AM) contracts at issue in this appeal are indefinite-delivery, indefinite-quantity (IDIQ) contracts for which the Government is only liable for the guaranteed minimum. Once that guaranteed minimum was met, Sage was not eligible to receive termination for convenience costs. With regard to Sage's requests for equitable adjustments, negligent estimates are not a basis for liability once the guaranteed minimum is met. We cannot find that HUD had superior knowledge about inventory that it declined to share with Sage, and, regardless, superior knowledge is irrelevant as long as the guaranteed minimum was met. Additionally, Sage has not demonstrated that HUD's actions towards Sage were not conducted in good faith, nor can Sage prove that there was a mutual mistake of fact fatal to the parties' agreement. Further, HUD properly exercised option year two in accordance with the terms of the contract and the direction of the Court of Federal Claims (COFC). Finally, although a bridge contract that HUD awarded Sage during the pendency of a bid protest was a requirements contract, the alleged diversion of inventory by HUD to its other disposition programs was not a breach of that bridge contract because Sage knew about the evolving policy decisions of HUD when it negotiated and entered into the contract, and HUD fulfilled the contract's requirement.

As such, Sage is not entitled to termination for convenience costs nor any additional costs sought in its September 28, 2021, claim and this subsequent appeal.

Background

HUD's Various Programs/Strategies to Dispose of Defaulted Properties

The Federal Housing Administration (FHA), an organizational unit within HUD, administers the single-family mortgage insurance program. FHA insures approved lenders against the risk of loss on loans that they finance for the purchase, and in some instances rehabilitation, of single-family homes. Generally, FHA properties are single-family foreclosed properties for which HUD has paid an insurance claim, and the titles have been conveyed to HUD. When a lender files a claim for insurance benefits with FHA and conveys the property to HUD, the property enters one of HUD's disposition programs. In the event of a default on an FHA-insured loan, the lender acquires title to the property by foreclosure, a deed-in-lieu of foreclosure, or other acquisition method.

HUD uses several different programs to dispose of defaulted properties. These programs can be divided into two categories: Real Estate Owned (REO) sales programs and REO alternative programs. The AM contracts at issue fall into the REO sales category. REO alternative programs include third-party sales (or claims without conveyance of title (CWCOT)), note sales (under the distressed asset stabilization program (DASP)), and pre-foreclosure sales (or short sales).

The utilization and outcome of the REO alternative programs is discussed in detail in FHA's Annual Report to Congress Regarding the Financial Status of the Mutual Mortgage Insurance (MMI) Fund. These annual reports are publicly available online.[1] As far back as 2012, FHA's annual reports have discussed improving the financial status of the MMI Fund through expansion of these programs: "Throughout the past fiscal year, FHA has been executing on an overall asset management strategy aimed at ramping up REO alternatives." In 2012, FHA wrote that "REO alternatives (primarily short sales) comprised about 15–20% of total dispositions since 2010, yielding average loss severities about 20% lower than REO. . . . FHA also unveiled its Distressed Asset Stabilization Program (DASP), another promising REO alternative."

The Management and Marketing (M&M) 3.7 Solicitation

The solicitation for the AM contracts, also referred to as the M&M 3.7 solicitation, was issued on July 25, 2014. The solicitation indicated that HUD would establish ten separate geographical areas for purposes of contract administration. Additionally, the solicitation stated that the intent was to award a single contract in each of the geographical areas rather than multiple awards in each area. The solicitation noted that the awards would be made as performance-based, single-award IDIQ contracts pursuant to Federal Acquisition Regulation (FAR) 16.504 (48 CFR 16.504 (2013)). The solicitation also stated as follows:

> In accordance with FAR 16.504(a)(4)(ii) and incorporated HUDAR [HUD Acquisition Regulations] clause 2452.216-76 [48 CFR 2452.216-76], the Government has established both minimum and maximum quantities and amounts for orders placed under the subject contract. The minimum guarantee shall serve as full consideration for the Government's liability under this contract, and the Government will be under no obligation to conduct further ordering of services from the named contractor beyond the guaranteed contract minimum.

The solicitation also included a listing of the different contract regions with a corresponding minimum ordering amount of $1,000,000. Section B.4 of the solicitation utilized a hybrid pricing method that combined a fixed unit rate, marketing fee, and specified cost-reimbursable elements.

---

[1] These reports are posted contemporaneously with a press release at https://www.hud.gov/fhammifrpt.

The AM Contracts

On September 25, 2015, Sage was awarded contract DU204SB-15-D-07 for area 1D (Denver). Additionally, Sage was awarded contracts DU204SB-15-D-12 for area 5P (Philadelphia) and DU204SB-15-D-05 for area 7A (Atlanta). Each of the three contracts was identified as a performance-based, single-award IDIQ contract as defined in FAR 16.504. Included in the contracts were FAR 52.216-22, Indefinite Quantity, and HUDAR 2452.216-76, Minimum and Maximum Quantities and Amounts for Order, with a guaranteed minimum order of $1,000,000.[2]

Collectively, these three contracts were known as the AM contracts. "The purpose of [these] performance based contract[s] is to obtain marketing and sales services for HUD's REO properties." Appeal File, Exhibits 13 at 920, 15 at 1102, 17 at 1287. In addition to the standard IDIQ clauses, the contracts included the following language in Section H.2, titled "Option to Increase/Decrease the Geographic Service Area":

> In accordance with FAR 16.504(a)(4)(ii) and incorporated HUDAR clause 2452.216-76, the Government has established both minimum and maximum quantities and amounts for orders placed under the subject contract. The minimum guarantee shall serve as full consideration for the Government's liability under this contract, and the Government will be under no obligation to conduct further ordering of services from the named contractor beyond the guaranteed contract minimum.
>
> After meeting the guaranteed contract minimum established in HUDAR Clause 2452.216-76, the Government reserves the right to noncompetitively increase or reduce the geographic service area of this contract through contract modification. . . . Realignment of the geographic area will become effective for all new assignments made after the effective date identified on the realignment modification. Assignments/Orders placed prior to a realignment modification being issued under this authority will remain with the existing contractor, unless the Government invokes a full or partial termination in accordance with FAR Part 49. The Government intends to utilize this clause as mechanism to incentivize a high level of performance by rewarding the most highly performing contractors with an opportunity to expand their geographic service area and provide a disincentive for non-performance of contract requirements

[2] Sage received awards for additional areas included in the M&M 3.7 solicitation. However, those contracts are not at issue in this appeal.

> by reducing the geographic service area of contractors who fail to meet contract expectations.

The AM contracts **did not** include clauses required for requirements contracts, such as FAR 52.216-21, Requirements, and HUDAR 2452.216-77, Estimated Quantities – Requirements Contract.

With regard to pass-through expenses, section B.4 of the AM contracts outlines four fees that will be reimbursed for actual costs incurred: appraisal fees; record retention and exit file delivery costs; costs associated with post-closing complaints; and a catch all for things like negative sales, homeowners association (HOA) fees, and property taxes.

The AM contracts provided for a "transition in" for the contractor, including a "start-up" phase which required the contractor to establish a physical infrastructure, retain support staff, and obtain necessary hardware and software within five to thirty business days after the effective date of each contract.

The AM contracts included FAR 52.249-4, Termination for Convenience of the Government (Services) (Short Form). The contracts also included FAR 52.249-6, Termination (Cost-Reimbursement). Section E.1 limited the application of cost reimbursement contract clauses to the cost reimbursement contract line item numbers (CLINs) and is not at issue here.

Each AM contract had a base period of September 25, 2015, through May 31, 2016. Additionally, the AM contracts advised that "[i]n accordance with the clause at 52.217-9, 'Option to Extend the Term of the Contract,' the contract may be extended for the following periods" and listed four twelve-month option years.

The Option Periods

On June 1, 2016, HUD exercised the first option period of each of the AM contracts under FAR 52.217-9 for a period of one year ending May 31, 2017. On June 1, 2017, HUD exercised the second option period for each of the AM contracts for another one-year period, ending May 31, 2018. During the second option period, HUD issued a six-month task order under each AM contract pursuant to section B.6, "Ordering."

Requests for Equitable Adjustment

On October 24, 2017, Sage submitted uncertified requests for equitable adjustments (REAs) in each of the AM contracts. In each of the REAs, Sage asserted that the basis was a significant and precipitous reduction in the scope of properties assigned to the contracts.

For the area 1D AM contract, Sage asserted total damages of $1,054,133. For the area 5P AM contract, Sage sought $1,005,581. For the area 7A AM contract, Sage asserted total damages of $720,988.

HUD denied all three REA requests. In all three denials, HUD stated that the guaranteed minimum of $1,000,000 had been satisfied and that there was no basis for an equitable adjustment. On January 16, 2018, HUD denied the REA for the area 5P contract and issued a single denial for the REAs for both the area 1D and area 7A contracts.[3]

Bridge Contract

On November 30, 2017, the parties entered into a bridge contract, which was needed as a result of a bid protest at the COFC.[4] The bridge contract contained language indicating that it was a requirements contract, with a period of performance from December 1, 2017, through May 31, 2018. Unlike the AM contracts, it did not include section H.2, titled "Option to Increase/Decrease the Geographic Service Area." The standard FAR clauses required for requirements contracts, however, were included.[5]

Termination for Convenience

All three AM contracts were terminated for convenience on January 10, 2018, as a result of the COFC's bid protest decision in *Q Integrated Cos. v. United States*, 126 Fed.

[3] Part of the single denial was an REA that Sage submitted for a separate contract referred to as the 8A contract. The 8A contract is outside of the scope of this appeal.

[4] HUD appears to have entered into this bridge contract to address the effect of the COFC's injunction in *Q Integrated Cos. v. United States,* 131 Fed. Cl. 125 (2017). As part of its decision in that protest, the COFC stated that the AM contracts for 7A, 1D, and 5P were to remain undisturbed for six months into the second option, or until November 30, 2017. *Id.* at 134.

[5] Several months later, HUD awarded Sage a second bridge contract (that one being an IDIQ contract under FAR 16.504) for areas 1D, 5P, and 7A, with a guaranteed minimum order of $75,000. Because HUD satisfied the minimum guarantee and Sage does not seek any monetary relief associated with the second bridge contract, we need not address it further in this decision.

Cl. 124, 148 (2016).[6] A separate notice of termination, citing FAR 52.249-2, Termination for Convenience of Government (Fixed-Price), was transmitted for each contract.

On February 1, 2018, HUD transmitted to Sage a proposed bilateral modification for all three AM contracts. The modifications stated that each would be a no-cost termination settlement. On February 7, 2018, Sage declined to execute the modifications.

Guaranteed Minimums Under the AM Contracts

HUD met the $1,000,000 guaranteed minimum set forth in all three AM contracts. Payments to Sage can be divided into two categories: monthly payments and reimbursement of pass-through costs. Specifically, Sage received $1,823,347.96 in monthly payments for the area 7A contract, $2,225,087.49 in monthly payments for the area 1D contract, and $3,924,285.64 in monthly payments for the area 5P contract.

Termination Settlement Proposal (TSP)

Sage submitted a TSP on January 10, 2019,[7] for the AM contracts. Sage raised multiple legal arguments in the TSP and proposed a termination for convenience settlement of $3,149,926 and an estimated REA of $2,934,597. Among other legal arguments, this REA repeated the significant reduction in the scope of properties argument that Sage included in the REA which it had previously submitted and which HUD had denied. On July 16, 2019, HUD denied the TSP. In this denial, HUD stated that previously resolved REAs were unrelated to the termination of the AM contracts and could not be considered as part of a TSP. HUD also reiterated that these contracts were IDIQ contracts and that the agency had satisfied the minimum ordering guarantee and its contractual obligations.

First Appeal to the CBCA

On October 11, 2019, Sage filed its notice of appeal with the Board, which was docketed as CBCA 6631. On January 28, 2021, we dismissed the appeal for lack of jurisdiction, concluding that Sage had failed to state a sum certain under the Contract

---

[6] *See also Q Integrated Cos. v. United States*, 132 Fed. Cl. 638, 642 n.1 (2017); *Q Integrated Cos. v. United States,* 131 Fed. Cl. 125 (2017).

[7] While our earlier decision in CBCA 6631 stated this date as January 9, 2019, it appears upon further review of the record that the correct date is January 10, 2019. *See Sage Acquisitions LLC v. Department of Housing & Urban Development*, CBCA 6631, 22-1 BCA ¶ 38,031 (2021), at 184,691. This error has no effect on our earlier or current holdings.

Disputes Act (CDA), 41 U.S.C. §§ 7101-7109 (2018). *Sage Acquisitions LLC v. Department of Housing & Urban Development*, CBCA 6631, 22-1 BCA ¶ 38,031 (2021).

Sage's Second Claim and Appeal

On September 28, 2021, Sage's court-appointed receiver submitted a certified claim arising from the same set of facts as Sage's earlier claim, and on January 31, 2022, the contracting officer issued a final decision denying the claim. Sage appealed the final decision on February 7, 2022.

Discussion

Sage seeks $3,149,926 for termination for convenience settlement costs and additional compensation of $8,790,218 related to HUD's alleged changes and breaches. As an initial matter, Sage claims that its certified claim has remedied the jurisdictional defect of its original TSP submission by identifying a sum certain, thus establishing CDA jurisdiction.

Sage argues that it was entitled to submit a TSP after the termination for convenience of the AM contracts. Additionally, it argues that the AM contracts were requirements contracts that do not survive HUD's minimum ordering defense and that Sage is entitled to additional costs under the contracts' Termination for Convenience clauses and its timely submitted TSP.

In regard to its REAs, Sage argues that HUD constructively changed the AM contracts on one of the following alternative grounds: HUD provided defective specifications or negligent estimates; HUD failed to disclose superior knowledge; HUD breached the covenant of good fath and fair dealing; there was a mutual mistake of fact between the parties; or HUD diverted properties in violation of the terms of the contract. Sage also asserts that HUD's exercise of the second option period under the AM contracts was illegal and constituted a breach of contract. Finally, Sage argues that HUD breached the first bridge contract by diverting inventory.

Sage's Termination Settlement Expenses Claim

A. Jurisdiction

We held in CBCA 6631 that Sage failed to state a sum certain in the original TSP and that this flaw deprived us of jurisdiction over the TSP as a claim. *Sage Acquisitions LLC*, 22-1 BCA at 184,694-95. In response to that decision, on September 28, 2021, Sage submitted to the contracting officer a new TSP, which it included in the same document as its REA claim. Notably, appellant has followed a similar procedure to the one that the Court

of Appeals for the Federal Circuit outlined in *England v. Swanson Group, Inc.*, 353 F.3d 1375 (Fed. Cir. 2004):

> The fact that the Board lacked jurisdiction over Swanson's previous appeal does not . . . bar Swanson from submitting a termination settlement proposal to the contracting officer at this time. If Swanson submits such a proposal now, the contracting officer will be in a position either to reject it on the ground that it is untimely or to consider it on the merits. If the contracting officer rules the proposal untimely, Swanson will have the option of appealing that decision as a denial of a claim under the CDA. If the contracting officer entertains the proposal and denies it in whole or in part, Swanson will have the option of appealing that decision as a denial of a claim under the CDA as well. *See, e.g.*, *Cedar* [*Construction*, ASBCA 42178, 92-2 BCA] ¶ 24,896, at 124,166 ("Such dismissal, however, is without prejudice to the resubmission of a proper claim . . . and filing a new appeal in the event of the contracting officer's denial of said claim.").

Id. at 1380.

In CBCA 6631, Sage had yet to determine the cost impact of the alleged breach of its bridge contract and claimed a total of $2,934,597 in "Estimated REA Total Cumulative Impact" as well as $3,149,926 in termination for convenience costs. *Sage Acquisitions*, 22-1 BCA at 184,692. The Board dismissed the claim for lack of jurisdiction because Sage had not identified a sum certain that it was seeking to recover. *Id.* at 184,693. Sage has remedied this defect in its current certified claim and TSP submitted on September 28, 2021. In that submission, Sage clearly delineates between claims arising out of its REAs ($8,790,218) and its proposed termination for convenience settlement costs ($3,149,926), and it makes clear that these two components are separate and distinct and do not overlap in any way: "The amounts sought in the first component and the second component do not overlap and are exclusive of each other." The purpose of the sum certain requirement is to "give[] the contracting officer adequate notice of the basis and amount of the claim." *Ari University Heights, LP v. General Services Administration*, CBCA 4660, 15-1 BCA ¶ 36,085, at 176,186 (citation omitted). Sage's certified claim has put the contracting officer on adequate notice of the bases of its claims and its TSP in the total amount of $11,940,144.

One additional jurisdictional requirement before the Board can consider a TSP is that the proposal must have ripened into a claim after it was submitted to the contracting officer. "When a contractor submits a termination settlement proposal, it is for the purpose of negotiation, not for a contracting officer's decision," and cannot therefore be a "claim." *James M. Ellett Construction Co. v. United States*, 93 F.3d 1537, 1543 (Fed. Cir. 1996); *see Ensign-Bickford Aerospace & Defense Co.*, ASBCA 58671, 14-1 BCA ¶ 35,599, at 174,407

("It is well established that a TSP is not a CDA claim when submitted to the [contracting officer] even though it otherwise meets the requirements of the CDA."). Nevertheless, the proposal can ripen into a claim, to which the contracting officer must respond with a decision, "[o]nce negotiations [between the parties have] reached an impasse." *James M. Ellett*, 93 F.3d at 1544. An impasse "is the point where an objective observer would conclude that resolution through continued negotiation is unwarranted or has been abandoned by the parties and the contractor desires a final decision." *Ensign-Bickford*, 14-1 BCA at 174,407. By the time that Sage presented its second proposal to the contracting officer and certified its claim, there was already a history between the parties regarding the first settlement proposal, and the parties were at an impasse over the second proposal, which ripened into a claim before it was certified and well before Sage filed this appeal. We possess jurisdiction to entertain it.

B. Sage's Entitlement to Termination Settlement Expenses

1. The Nature of the AM Contracts

On the merits, we first consider whether the AM contracts at issue were IDIQ contracts or requirements contracts. To answer this question, we analyze the plain language of the contracts at issue. "It has been long recognized that where a contract provision is clear, '[t]he rules of contract construction should not be permitted to create an ambiguity where none exists or change or twist the plain meaning of a simple agreement.'" *Au' Authum Ki, Inc. v. Department of Energy*, CBCA 2505, 14-1 BCA ¶ 35,727, at 174,890-90 (quoting *National Housing Group, Inc. v. Department of Housing & Urban Development*, CBCA 340, et al., 09-1 BCA ¶ 34,043, at 168,377). In determining whether a contract is an IDIQ contract or a requirements contract, we look to what FAR provisions were included in the contract and whether the contract involved language of exclusivity. *See, e.g.*, *OWL, Inc. v. Department of Veterans Affairs*, CBCA 7183, 22-1 BCA ¶ 38,012, at 184,612-13 (2021).

Section B.1 of each AM contract clearly identifies each as an IDIQ contract, stating that "[t]his is a performance-based, single award Indefinite Delivery Indefinite Quantity contract as defined in Section 16.504 of the Federal Acquisition Regulation (FAR) and in Section I, FAR Clause 52.216-22. . . . The contract minimum and maximum quantities available for order are specified in HUDAR 2452.216-76, Minimum and Maximum Quantities and Amounts for Order." Additionally, the AM contracts reproduced FAR 52.216-22, Indefinite Quantity (OCT 1995), in full. HUDAR 2452.216-76 was also included in each and contained a guaranteed minimum of $1,000,000 for each of the contracts. The AM contracts did not include the clauses normally included in requirements contracts, such as FAR 52.216-12, Requirements, or HUDAR 2452.216-77, Estimated Quantities – Requirements Contract.

Additionally, there is no language in the AM contracts to suggest that Sage had the exclusive rights to orders from HUD for the duration of the AM contracts. Exclusivity is important because it is the consideration given by the Government under a requirements contract. *See Valor Healthcare, Inc. v. Department of Veterans Affairs*, CBCA 6824, 22-1 BCA ¶ 38,039, at 184,733 (2021); *National Housing Group*, 09-1 BCA at 168,377 (citing *Travel Centre v. Barram*, 236 F.3d 1316, 1319-20 (Fed. Cir. 2001)). Sage attempts to read exclusivity into the contract by focusing on the word "all" located in sections 6.2.1.1 and 6.2.1.2 of the AM contracts. However, the fact that, after the minimum amount was met, the Government could reduce the geographical area covered by the AM contracts to nothing under section H.2 of the contracts conclusively establishes that Sage had no exclusive right to work for the entire duration of the contract. That the required FAR clauses for requirements contracts were missing and that there was no exclusivity under the contract, coupled with inclusion of the IDIQ FAR clauses and a guaranteed minimum, lead us to conclude that the contracts at issue were properly issued IDIQ contracts.

2. Termination Expenses After The Guaranteed Minimum Was Satisfied

The Government was obligated under each of the contracts to purchase the guaranteed minimum but had no legal obligation to purchase services beyond that. *See Travel Centre*, 236 F.3d at 1319. The guaranteed minimum under each was $1,000,000. None of the options in the AM contracts contained additional guaranteed minimums nor were they required to include a minimum. *See Varilease Technology Group, Inc. v. United States*, 289 F.3d 795, 800 ("Minimum quantities are not required to be associated with each option period."). It is undisputed that the guaranteed minimums were met for each area based on monthly payments alone. Specifically, Sage received $1,823,347.96 in monthly payments for the area 7A contract, $2,225,087.49 in monthly payments for the area 1D contract, and $3,924,285.64 in monthly payments for the area 5P contract. The risk of any losses incurred by the contractor as a result of start-up costs that exceeded this minimum lies squarely with the contractor. Additionally, any projected costs for terminated work are not recoverable because, when the contracts were terminated, the Government had no further legal obligation under the contracts because the guaranteed minimums had already been met.[8] *Travel Centre*, 236 F.3d at 1319; *see CAE USA, Inc. v. Department of Homeland Security*, CBCA 4776, 16-1 BCA 36,377, at 177,353 ("Even if an IDIQ contract is terminated for convenience, a contractor cannot recover convenience termination settlement costs if the Government has satisfied the minimum order requirements of an IDIQ contract." (citing *International Data Products Corp. v. United States*, 492 F.3d 1317, 1324 (Fed. Cir. 2007))).

[8] Because we have found that, on the merits, Sage is not entitled to recover any termination settlement expenses, we need not address the agency's arguments that the contracts, as written, barred applications for termination settlement expenses or that Sage's second TSP was untimely.

We therefore deny appellant's claim for $3,149,926 in termination for convenience costs.

Requests for Equitable Adjustments ($8,790,218)

Sage's REAs assert four main theories of recovery. The first REA ($1,984,025) revolves around an alleged constructive change under the AM contracts. The second REA ($950,572) alleges excess reimbursable costs under the AM contracts. The third REA ($153,733) deals with the exercise of the second option under the AM contracts. Finally, the fourth REA ($5,701,888) alleges a breach of the first bridge contract. For the reasons discussed below, we deny all four REAs.

A. REA One: Constructive Change ($1,984,025)

Sage's first REA alleges a constructive change under the AM contracts. A constructive change occurs when "a contractor performs work beyond the contract requirements, without a formal order under the changes clause." *National Housing Group*, 09-1 BCA at 168,378 (citations omitted). Sage alleges five alternative bases for constructive change: (1) negligent estimates, (2) superior knowledge, (3) breach of the duty of good faith and fair dealing, (4) mutual mistake, and (5) inventory diversion. We discuss four of the bases below but will address the fifth basis as part of our discussion of Sage's fourth REA.

Sage argues that one basis for a constructive change was HUD's alleged use of negligent estimates in the specifications. The Federal Circuit has made it clear that potentially negligent estimates in the solicitation of an IDIQ contract are not a basis for breach as the contractor has no reasonable expectation of the Government's needs beyond the guaranteed minimum. *Travel Centre*, 236 F.3d at 1319; *see Valor Healthcare*, 22-1 BCA at 184,733 ("The government cannot be liable for breaching an indefinite quantity contract on the basis of making negligent estimates as long as the government orders the guaranteed minimum." (quoting *American General Trading & Contracting, WLL*, ASBCA 56758, 12-1 BCA ¶ 34,905, at 171,635-36 (2011))).

Sage alternatively argues under its first REA that HUD failed to disclose superior knowledge. Sage identifies two facts that it alleges HUD failed to disclose: (1) information relating to housing information and levels of sales, and (2) HUD upcoming policy change to focus on disposition programs other than the REO program. Again, however, under IDIQ contracts, the Government's only obligation to the contractor is to meet the guaranteed minimum, and there is no reasonable basis for the contractor to expect the Government's need to exceed this minimum. Any superior knowledge that the agency may have possessed is ultimately immaterial, so long as it met its obligation to deliver the guaranteed minimum

under the contracts. *See, e.g.*, *Valor Healthcare*, 22-1 BCA at 184,734; *Transtar Metals, Inc.*, ASBCA 55039, 07-1 BCA ¶ 33,482, at 165,959.

We find no evidence in the record to support Sage's allegation that HUD breached its duty of good faith and fair dealing, nor do we find evidence of a mutual mistake under the AM contracts. Many of Sage's challenges are to the solicitation, specifically regarding solicitation type and the amount of the guaranteed minimum, and should have been brought as bid protests to the solicitation. We cannot agree with Sage that HUD has breached its duty or that there was a mistake when Sage's issues are with the type of contract which HUD chose to pursue and which Sage ultimately signed. HUD met the guaranteed minimum and fulfilled the obligations it had to Sage under the IDIQ contracts.

B. REA Two: Excess Reimbursable Costs ($950,572)

Sage's second REA seeks excess reimbursable costs purportedly resulting from a constructive change under the contract. Section B.4 of the contract governs the cost reimbursable CLINs, outlining four fees that will be reimbursed for actual costs incurred: appraisal fees; record retention and exit file delivery costs; costs associated with post-closing complaints; and a catch all for things like negative sales, HOA fees, and property taxes. Section B.4 goes on to limit appraisal fee reimbursement to $350 and to condition the post-closing complaints costs and catch all on advance approval by the general technical representative (GTR). Sage argues that HUD "could not expect Sage to know that the appraisals, for example, may exceed $350 apiece." Additionally, Sage argues that the GTR approval process was inconsistent and confusing. We find no evidence in the record that these allegations against HUD constituted a constructive change that entitles Sage to be reimbursed beyond what HUD has already reimbursed it.

C. REA Three: Exercise of the Second Option Period ($153,733)

Sage's third REA alleges an illegal exercise of the second option period under the AM contracts. In reviewing Sage's argument, it appears that Sage's complaint lies with the issuance of a six-month task order after the exercise of the second option and not with the option exercise itself. Section B.6 of the AM contracts states in pertinent part: "Ordering. Written Task Orders for this service contract will be issued on a yearly basis, in accordance with Section C, Paragraph 1.4." Sage argues that the issuance of a task order with a period of performance of six months violated this clause.

We cannot agree. The phrase "issued on a yearly basis" does not mean that the task order was required to have a period of performance of a year but, rather, that the need for task orders was to be considered once per year. Even if the issuance of a task order with less than one year of performance violated the contract, however, Sage suffered no harm because,

as the Government had met the guaranteed minimum under the AM contracts before the second option year began, it had no further obligation to issue any task orders under the contracts. *Varilease*, 289 F.3d at 800; *Travel Centre*, 236 F.3d at 1319.

Additionally, the Government was merely complying with an injunction issued by the COFC relating to the bid protest filed on the AM contracts. The court's injunction required the Government to continue to allow Sage to perform its services under the contracts until six months into the second option period. *Q Integrated Cos. v. United States*, 131 Fed. Cl. 125, 134 (2017). This was because Sage argued to the COFC that, without this guarantee, it would be highly prejudiced by the court's cancellation of the contract. This direction from the COFC came on March 27, 2017, *before* the Government exercised the second option and issued the task order under the contract. *Id.* We will not grant Sage damages for the Government's compliance with a court-issued injunction which had a delayed implementation for the benefit of Sage.

D. REA Four: Diversion of Inventory ($5,701,888)

Finally, Sage raises an argument in its first and fourth REAs that a diversion of assets to HUD's other disposition programs represented a breach under the AM contracts and the first bridge contract. Sage alleges that, beginning in 2015, HUD actively promoted and increasingly utilized two HUD programs, the DASP and the CWCOT, to dispose of properties at earlier stages in the overall disposition process before they could become eligible to enter the REO program, believing that use of the DASP and CWCOT programs would reduce HUD's overall costs and increase revenues. In support, Sage cites a 2017 FHA report to Congress in which FHA represented that, since 2013, it had increasingly been able to dispose of properties other than through REO:

> A notable trend is the continuing reduction, beginning in FY 2013, of REO dispositions, versus other asset disposition options that are less costly to HUD. In FY 2017, REO sales represented 45.3 percent of asset dispositions, down from 51.7 percent in FY 2016. [CWCOT] dispositions increased to 39.2 percent of dispositions in FY 2017, a substantial increase from 25.7 percent in FY 2016.

Sage argues that, by providing inaccurate estimates of the number of dispositions that Sage was likely to receive when awarding the AM contracts and the first bridge contract, HUD breached those contracts.

The record here does not contain any evidence that, in developing its original estimates of the number of dispositions that Sage was likely to receive under the AM contracts, HUD did not account for the policies about which Sage is complaining.

Nevertheless, for purposes of evaluating Sage's argument as it applies to the AM contracts, how HUD developed the estimates is irrelevant. The AM contracts, as we held above, were IDIQ contracts. Policy changes that might affect the number of dispositions that the contractor would receive under the AM contracts or that might render estimates for those IDIQ contracts negligent would not entitle Sage to recovery so long as the Government satisfied its obligation to Sage by meeting the guaranteed minimum under the contracts. *See Travel Centre*, 236 F.3d at 1319.

The rules applicable to negligent estimates under requirements contracts, like the first bridge contract, are different. "A requirements contract calls for the government to fill all its actual requirements for specified supplies or services during the contract period by purchasing from the awardee, who agrees to provide them at the agreed price." *Medart, Inc. v. Austin*, 967 F.2d 579, 581 (Fed. Cir. 1992). So that an offeror seeking such a contract can create a reasonable bid, the Government must "state a realistic estimated total quantity in the solicitation and resulting contract," even though the estimate is not a guarantee of what will actually be needed. *Id.* (quoting FAR 16.503(a)(1)). "Where a contractor can show by preponderant evidence that estimates were 'inadequately or negligently prepared, not in good faith, or grossly or unreasonably inadequate at the time the estimate was made[,]' the government could be liable for appropriate damages resulting." *Id.* (quoting *Clearwater Forest Industries, Inc. v. United States*, 650 F.2d 233, 239 (Ct. Cl. 1981)). The mere fact that the quantities actually ordered fall short of the estimate, however, does not mean that the estimate was negligently or improperly prepared. *Clearwater Forest*, 650 F.2d at 240.

Sage's first bridge contract, as a requirements contract, entitled Sage to all asset management work for HUD's REO properties in areas 7A, 1D, and 5P during the performance period of that contract. It is undisputed that, during the performance period of that bridge contract, HUD gave Sage all of its REO properties in those areas, which satisfied the requirements of the contract.

Sage does not argue that HUD failed to assign it all properties that were part of the REO program during the bridge contract's period of performance. Instead, Sage complains that HUD, by encouraging the use of the DASP and CWCOT programs for disposing of properties before they could reach the REO program, caused a decrease in what was available for disposition through the REO program. It is true that, in developing estimates for a requirements contract, an agency must take into account and make the contractor aware of recent or impending policy changes that may affect the accuracy of the agency's historical data and the ultimate reasonableness of the agency's forward-looking estimates. *See, e.g.*, *Hi-Shear Technology Corp. v. United States*, 53 Fed. Cl. 420, 431-32 (2002), *aff'd*, 356 F.3d 1372 (Fed. Cir. 2004); *Datalect Computer Services, Ltd. v. United States*, 40 Fed. Cl. 28 (1997), *aff'd in relevant part*, 215 F.3d 1344 (Fed. Cir. 1999) (table). Here, though, Sage acknowledges that it was aware of the policies about which it is now complaining by, at the

latest, April 1, 2016. Accordingly, Sage was well aware of these programs and HUD's use of them before it entered the bridge contract on November 30, 2017. If a contractor is aware of a defect in a contract's terms before it is awarded the contract, it cannot remain silent and complain about it for the first time after performance has commenced and expect to be compensated. *John Douglas Burke v. Department of Health & Human Services*, CBCA 7492, slip op. at 12 (Mar. 10, 2023). When Sage entered into the bridge contract, it was the incumbent contractor and had immediate experience working with HUD and its estimates. Sage was on notice of any evolving policy goals relating to these programs when it bargained for and entered into that bridge contract, and it cannot now claim that those circumstances entitle it to relief under the contract when HUD satisfied the requirement of assigning Sage all of the REO properties.[9]

We have considered all of Sage's other arguments and find they lack merit. As such, we deny Sage's appeal.

Decision

The appeal is **DENIED** in its entirety.

Patricia J. Sheridan
PATRICIA J. SHERIDAN
Board Judge

We concur:

Harold D. Lester, Jr.
HAROLD D. LESTER, JR.
Board Judge

Kyle Chadwick
KYLE CHADWICK
Board Judge

[9] If Sage is alleging that HUD further increased its use of DSAP and CWCOT during the performance of the first bridge contract beyond what it had done during the AM contracts, Sage has not proven that allegation. If Sage is alleging that HUD's use of those programs, outside of the context of its negligent estimates argument, is a breach of HUD's obligations to Sage under the express terms of that bridge contract, we can find no contract provision in the contract restricting HUD's use of those other programs, precluding Sage from establishing a breach. *See Minesen Co.*, ASBCA 52488, et al., 07-1 BCA ¶ 33,456, at 165,856 (2006) (holding that, where the contract expressly required that federal employees would be required to stay at appellant's lodge to receive government per diem, a change in government policy eliminating that requirement breached the terms of appellant's contract).