ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of -	)	
	)	
WSP USA Solutions Inc.	)	ASBCA No. 62674
	)	
Under Contract No. W911WN-15-D-0001	)	

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OPINION BY ADMINISTRATIVE JUDGE WOODROW

This appeal returns to the Board on remand from the United States Court of Appeals for the Federal Circuit. *WSP USA Sols. Inc. v. Sec'y of the Army*, No. 23-1256, 2025 WL 573242 (Fed. Cir. Feb. 21, 2025) (nonprecedential). The Federal Circuit vacated our October 13, 2022, decision, which had concluded that Contract No. W911WN-15-D-0001 unambiguously fixed task order pricing at the time the task order was placed, regardless of option year, holding that the Board erred by failing to consider the contract "in its entirety as modified by the later-issued task orders." 2025 WL 573242 at *1. Rejecting both parties' arguments that the pricing scheme is unambiguous, the court directed the Board to conduct a "fuller and more focused analysis" of the pricing provisions, accounting for the task order modifications, and to apply standard contract-interpretation steps if ambiguity persists. *Id*. at 14-23.

We have now conducted the fuller analysis the Federal Circuit directed, considering the contract as a whole and as modified by the later-issued task orders. For the reasons set forth below, we find that the contract, as modified, is not ambiguous as to the disputed pricing question. The bilateral modifications – which the

Federal Circuit instructed us to treat as part of the contract – placed and continued all of the hurricane response work, its funding, and its ceiling under the Option Year 2 line item (CLIN 2001). Read together with the contract's own direction that pricing for each item follow "the corresponding rate schedule," the contract as a whole allows for only one reasonable interpretation: that the disputed work is priced at Option Year 2 rates. The parties' subsequent course of performance independently confirms this conclusion. Accordingly, on remand, we deny the appeal.

STATEMENT OF FACTS

The Board incorporates by reference the findings of fact set forth in its October 13, 2022 decision (findings 1- 29) with the exception of finding 2, which we correct to find that the contract is a requirements contract and not an indefinite quantity indefinite delivery contract (R4, tab 2 at 13-22). We supplement our original findings with the following additional findings relating to the contract modifications that the Federal Circuit directed us to consider.

I. The Contract

30. On October 22, 2014, the U.S. Army Corps of Engineers (USACE) awarded requirements Contract No. W911WN-15-D-0001 to WSP USA Solutions Inc. (WSP or appellant) to provide temporary emergency power services for declared federal disasters. The contract had an initial total maximum value of approximately $95 million, consisting of a one-year base period and four one-year option periods which the government could choose to exercise. (R4, tab 2 at 12-22, 27)

31. To organize the work by year, Section B of the contract used a series of contract line item numbers (CLINs). CLIN 2001 corresponded to Option Year 2 (OY2) and CLIN 3001 corresponded to Option Year 3 (OY3). The contract established the maximum spending limit, or Not-to-Exceed (NTE) "ceiling," for each option year in an unusual manner. Instead of a discrete annual limit, the ceiling for each new year was defined as the "unexpended amount remaining from the *prior* year," creating a rollover ceiling value for the life of the contract (R4, tab 2 at 13-22).

32. Section J of the contract contained Attachment 1, a detailed "Rate Schedule." This schedule established the specific, firm-fixed prices, or "Rates," that WSP was entitled to for discrete categories of labor and equipment (e.g., the price for an electrician per day or a generator per week). Critically, this Rate Schedule provided for an approximately three percent escalation in these firm-fixed prices for each successive option year, meaning the rates for OY3 were higher than for OY2 (R4, tab 2 at 91-95).

33. Section F of the contract set forth a "Delivery Information" chart that defined the specific period of performance for each CLIN. It listed CLIN 2001 (OY2) as covering the period from October 22, 2016, through October 21, 2017, and CLIN 3001 (OY3) as covering the period from October 22, 2017, through October 21, 2018 (R4, tab 2 at 62-63). The contract also incorporated by reference the "changes" clause at Federal Acquisition Regulation (FAR) 52.243-1, Alt. I (Aug 1987) (R4, tab 2 at 68).

34. To connect the yearly CLINs with their corresponding prices, the narrative for each CLIN in Section B stated: "THE CONTRACTOR SHALL PROVIDE PRICING IN ACCORDANCE WITH THE NARRATIVE IN SECTION B AND THE CORRESPONDING RATE SCHEDULE INCLUDED AS ATTACHMENT 1, WHICH WILL BE INCLUDED IN THE CONTRACT." (R4, tab 2 at 13-22)

II.Hurricane Response and Task Order Issuance

35. On August 16, 2017, USACE exercised the contract's third option year (OY3), establishing a new period of performance to run from October 22, 2017, through October 21, 2018 (R4, tab 8 at 328, 333-34). Although exercised on August 16, 2017, OY3's performance period did not commence until October 22, 2017 (*id.* at 328).

36. Shortly thereafter, in response to Hurricanes Irma and Maria, USACE issued three initial Task Orders during the OY2 performance period: Task Order No. 3031, Task Order No. 3033, and Task Order No. 3001. Task Order Nos. 3031 and 3033 were assigned to CLIN 2001, the designated line item for OY2, (R4, tabs 18, 44, 55), while Task Order No. 3001 initially was assigned under CLIN 3001 (R4, tab 55 at 487).

A. Modifications to the Task Orders and Contract During the Hurricane Response

37. As the hurricane response mission expanded dramatically, the parties executed a continuous series of modifications. Between September 2017 and September 2018, USACE issued 23 modifications to Task Order No. 3031 alone, each increasing funding or extending performance under CLIN 2001 (R4, tabs 19-41). Five of these modifications (R4, tabs 19-23) were executed during the OY2 period, while the remaining 18 modifications (R4, tabs 24-41) were bilaterally executed *after* the OY3 period had commenced on October 22, 2017 (R4, tabs 24-30, 32, 34-41). WSP signed each bilateral modification using Standard Form 30 (SF 30) without raising any objection to the continued obligation of funds under the OY2 CLIN. (R4, tabs 19-41).

38. The financial and temporal scale of these post-OY2 modifications was immense, yet the parties consistently preserved the OY2 pricing structure: At the end of OY2, the total value of Task Order No. 3031 was approximately $22.8 million. Through the 18 bilateral modifications executed during the OY3 period, the parties added over $668 million in funding under the OY2 CLIN 2001, resulting in a final task order value of $691.47 million—a nearly 3,000% increase (R4, tabs 24-40, 41 at 448, 154 at 15145). While modifications added funding under Section B as a lump-sum "Job," they added a total of 426 performance days by extending the task order's Period of Performance (POP) dates under Section F. The initial task order and OY2 modifications (culminating in Modification No. P00005) established a POP of September 20, 2017 through November 2, 2017, representing 44 days of service ordered during OY2. (R4, Tab 24 at 396-97). The remaining 382 days of service (covering November 3, 2017 through the final completion date of November 20, 2018) were added via bilateral modifications executed during OY3. (R4, Tab 41 at 447-49). Each of these 18 OY3 modifications was executed bilaterally using Standard Form 30 (SF 30). Rather than accessing the OY3 Rate Schedule, each modification explicitly stated that "[a]ll other terms and conditions remain unchanged" or that all underlying terms of the task orders "remain unchanged and in full force and effect." (R4, tabs 13 at 363, 23 at 393-94, 41 at 447; G-021-23).

39. A similar pattern followed for Task Order Nos. 3033 and 3001. Almost all the modifications, including those issued well into the OY3 performance period, consistently added funds to CLIN 2001. Notably, when Task Order No. 3001 was briefly and erroneously funded under the OY3 CLIN, the parties executed a modification to correct the error and move the funding back to CLIN 2001. WSP signed all of these modifications. (R4, tabs 45-51, 53, 55-59, 62-65)

40. The parties' decision to consolidate all hurricane work under the OY2 CLIN was further demonstrated by a series of four bilateral modifications executed between September and November 2017. Three of these modifications transferred over $70 million in contract ceiling capacity *away* from the OY3 CLIN (3001) and *back* to the OY2 CLIN (2001) to "ensure that sufficient ceiling is available for hurricane response missions." WSP signed each of the modifications. (R4, tabs 10-12).

41. The fourth and most significant of these modifications occurred on November 22, 2017, a full month into the OY3 period. On that date, the parties executed a bilateral modification that increased the contract's maximum value by $860 million. The parties had a clear choice to place this new ceiling on the active OY3 CLIN (3001) or the ostensibly expired OY2 CLIN (2001). They mutually agreed, in writing, to allocate the entire $860 million increase to CLIN 2001 (R4, tab 13 at 363-64).

42. The government's internal justification for this massive ceiling increase, approved just before the modification was signed, memorialized its understanding of this choice, stating: "The current missions were executed and remain active in option period 2. Accordingly, option periods 3 and 4 will not be utilized . . . ." (R4, tab G-019 at 16515) (internal USACE approval document).

43. Following these modifications, WSP's performance aligned with the decision to use the OY2 CLIN. For more than nine months – from the start of OY3 in October 2017 through June 2018 – WSP submitted all of its invoices and Daily Expenditure Reports using the OY2 rates corresponding to CLIN 2001 (R4, tabs 67-147).

44. On July 23, 2018, nine months after the start of OY3 and after the parties had bilaterally added hundreds of millions of dollars to the OY2 CLIN, WSP first communicated to USACE its position that it was entitled to OY3 pricing for work performed during the OY3 period (R4, tab 148).

45. WSP's subsequent certified claim, submitted in March 2020, sought over $14 million, representing the difference between the OY2 rates it had invoiced for nearly a year and the higher OY3 rates (R4, tab 154 at 15144-45).

B. WSP's Internal Communications

46. Following the government's rejection of its claim, WSP's internal communications reveal a search for an alternative, post-hoc legal theory to justify payment at OY3 rates. In one email exchange, WSP personnel discussed attempting to "invalidate Option Year 2 and the resulting task orders that were issued for [Hurricane] Maria late September and early October 2017 right at the end of the POP for CLIN 2001." (R4, tab G-013 at 16482) The same email acknowledged the weakness of this position: "assuming there was no notice (fingers crossed), we still have a problem because we went along with it and didn't challenge it. The general contract law principle is that a contractor's silence, in the face of an improper option exercise, is acceptance and the contractor is thus estopped from claiming an equitable adjustment later." (*Id.*) Despite this apparent legal hurdle, the email concluded: "Nonetheless, it would give me an opening to blow smoke and create doubt in their position" (*id.*).

47. In an internal email to WSP's Vice President, Mr. Vince Ricevuto, Christopher Wolf, WSP's Senior Vice President, Contracts & Procurements, characterized this same legal strategy as a "Hail Mary," writing: "Let's light a few candles and hope Josh [the Contracting Officer] missed it. I might have them where it really hurts." (R4, tab G-012 at 16480)

48. In his deposition, Mr. Ricevuto confirmed that WSP's signatures were deliberate, stating that he signed only with the express approval of WSP's Vice President of Contracts and Procurement (R4, tab G-026 at 16791-92).

49. WSP's management also contemplated how to justify its nine-month delay in raising the pricing issue. In a separate exchange discussing the Contracting Officer's assertion that WSP was a "large and 'sophisticated' company that easily had the means to catch this mistake and deal with it," Margaret Burcham, WSP's Vice President, commented internally, "And we are, but that's beside the point." She further suggested WSP would need to provide a "good story about the fog of war" to explain why it had not raised the OY3 pricing issue sooner (R4, tab G-015 at 16488).

50. An action taken five months *before* WSP first demanded higher OY3 rates from the government stands in sharp contrast to its subsequent claim. In early 2018, WSP began actively contacting its own subcontractors to ask them to review and reduce their rates, which are typically available when a mission transitions from an initial high-cost "response" period into a lower-cost "sustainment" phase. (R4, tabs G-007 at 16093, G-008 at 16219, G026 at 16870-71)

DECISION

I. Jurisdiction and Standard of Review

The Board has jurisdiction to entertain this appeal pursuant to the Contract Disputes Act of 1978, 41 U.S.C. §§ 7101 - 7109. The appeal is before us on remand from the Federal Circuit, which vacated our prior decision and directed us to conduct a "fuller and more focused analysis" of the contract's pricing provisions. *WSP USA Sols. Inc. v. Sec'y of the Army*, No. 23-1256, 2025 WL 573242 at *10 (Fed. Cir. Feb. 21, 2025). Both parties elected to submit this appeal on the record pursuant to Board Rule 11(a). As the proponent of the claim, WSP bears the burden of proving entitlement and quantum. *Wilner v. United States*, 24 F.3d 1397, 1401-02 (Fed. Cir. 1994). Following the remand, both parties submitted additional briefs addressing the issues raised in the remand.

II. The Contract, Considered as a Whole and as Modified, Is Not Ambiguous as to Pricing

Our analysis on remand requires us to consider "the contract in its entirety as modified by the later-issued task orders[,]" *WSP USA Sols. Inc.*, 2025 WL 573242 at *1, and to evaluate "the pricing provisions of the contract accounting for the modifications made to the task orders." *Id.* at *8.

A written agreement "must be considered as a whole and interpreted so as to harmonize and give reasonable meaning to all of its parts." *Coast Fed. Bank, FSB v. United States*, 323 F.3d 1035, 1038 (Fed. Cir. 2003) (*en banc*) (citing *McAbee Constr., Inc. v. United States*, 97 F.3d 1431, 1435 (Fed.Cir.1996)). A contract provision is ambiguous if it is reasonably susceptible to more than one interpretation. *Premier Off. Complex of Parma, LLC v. United States*, 916 F.3d 1006, 1011 (Fed. Cir. 2019). It is insufficient that the parties merely disagree as to interpretation; each proffered reading must fall within a "zone of reasonableness." *Metric Constructors, Inc. v. Nat'l Aeronautics and Space Admin.*, 169 F.3d 747, 751 (Fed. Cir. 1999).

Critically, the Federal Circuit did not hold the contract ambiguous. Rather, it held that the Board had not yet established that the contract was *unambiguous*, because the Board had analyzed the initial schedule in isolation without considering the contract as a whole, including its subsequent task order modifications. The Court explicitly noted that a "fuller and more focused analysis" "might yet lead to a sound conclusion that the contract as a whole is ultimately unambiguous." *WSP USA Sols., Inc.*, 2025 WL 573242, at *10.

A. The Integrated Contract Text Is Unambiguous

The parties present two competing interpretations of the contract. WSP argues that pricing is determined by the *period of performance*, that is, work performed during the OY3 period must be paid at the higher OY3 rates listed in the Section J Rate Schedule. The government contends that pricing is fixed based on the *task order issuance date*, specifically that work on a task order issued in OY2 is paid at OY2 rates for the duration of the task, regardless of when the work is performed.

When evaluating the original contract sections in isolation, WSP's position has a superficial appeal. The contract's financial structure relies on three distinct concepts: Rates, Ceiling, and Funding. First, Section F defines distinct, year-long "periods of performance" that correspond to the "Rates": the firm-fixed, escalating prices for services set forth in the Section J Rate Schedule. Second, the narrative in Section B connects these elements by directing that each annual CLIN's pricing be "in accordance with . . . the corresponding rate schedule," while also using a rollover mechanism to establish the "Ceiling" (or NTE), which is the maximum value that could be ordered under a given CLIN. Finally, "Funding" represents the amount of appropriated dollars the government had formally obligated to the contract at any given time to pay for the ordered work. (R4, tab 2 at 13-22, 54-56, 91-95). Reading these sections in isolation, it seems reasonable to conclude that rates should escalate with the period of performance. It was precisely this facial plausibility, when confronted with the government's contrary interpretation, that led the Federal Circuit to conclude the Board had not yet shown the contract to be unambiguous when the

Board examined the original schedule alone. WSP USA Sols., Inc., 2025 WL 573242, at *8-9.

However, WSP's interpretation becomes legally and textually unsustainable when the contract is evaluated as an integrated whole, incorporating the bilateral task order modifications. Each task order specifies the CLIN (listed in Section B of the contract) under which work is ordered and funded. To determine the applicable pricing for the extended performance, we look directly to the express text of the task orders and their bilateral modifications, which constitute binding, integrated terms of the baseline contract. *See Mil-Spec Contractors, Inc. v. United States*, 855 F.2d 865, 867-68 (Fed. Cir. 1987) (holding that a signed bilateral modification operates as a binding amendment to contract terms).

The text of these modifications establishes an unambiguous textual directive: the parties placed and kept all hurricane-response work and the entire $860 million ceiling increase under CLIN 2001 (the OY2 line item) (findings 37, 40-42). First, over $85 million was transferred from CLIN 3001 (OY3) to CLIN 2001 (OY2) during both OY2 and OY3 to provide sufficient ceiling for hurricane response, with the last such transfer occurring during OY3 itself (finding 40). Second, the $860 million ceiling increase on November 22, 2017 – executed a full month into the OY3 period – was allocated entirely to CLIN 2001, not distributed among CLIN 2001 and CLIN 3001 (finding 41). Third, every modification to the three task orders, including those executed well into OY3, continued to allocate funds to CLIN 2001 and referenced OY2 pricing (findings 37 - 41). Fourth, WSP signed each of these bilateral modifications without objection, without reserving any right to OY3 pricing and without requesting allocation to CLIN 3001 (findings 39 - 41).

These modifications were formal, written amendments that became integrated terms of the contract upon bilateral execution. Eighteen of the twenty-three modifications to Task Order No. 3031 alone were executed after the OY3 performance period had already begun; those modifications collectively added over $668 million to Task Order No. 3031, all allocated to CLIN 2001. Most significant is the November 22, 2017 modification allocating the entire $860 million ceiling increase to CLIN 2001, executed at a time when performance was actively extending well into OY3. The contract schedule contained distinct line items – CLIN 2001 (OY2) and CLIN 3001 (OY3) – providing a clear textual mechanism to designate OY3 rates had the parties so agreed. Instead, the express written terms of each modification repeatedly assigned the work and funding to CLIN 2001. Upon bilateral execution, these written terms became binding, integrated contractual provisions that anchored work to CLIN 2001 and its corresponding OY2 rate schedule. *Mil-Spec Contractors, Inc.*, 855 F.2d at 867-68 (recognizing that an executed bilateral modification legally binds both parties to its written terms). This structural reallocation carries only one textually sound meaning: the parties explicitly agreed to fund and execute work under

CLIN 2001 at Option Year 2 rates. Reading the contract as WSP suggests would render these bilateral transfers nonsensical and surplusage. Because the government's interpretation is the *only* reading that harmonizes the original contract terms with the express language of the task order modifications, it is the sole reasonable textual interpretation. In sum, because the bilateral modifications defeat WSP's reading, the contract as a whole is unambiguous.

Having established that the integrated contract text is plain on its face, we need not rely on external regulatory frameworks to resolve this dispute. While the government contends that FAR 16.505(a)(2) reinforces fixing prices at order issuance, WSP argues that this FAR provision constitutes unexpressed extrinsic evidence (app. reply at 2, 6). We need not resolve this regulatory debate. Under standard canons of construction, where the contract's own terms, read as a whole and as modified, provide a single reasonable meaning, the enquiry ends. *Coast Fed. Bank*, 323 F.3d at 1038.

B. WSP's Counterarguments

WSP advances several arguments to avoid the textual impact of the modifications, none of which are persuasive.

First, WSP contends that contract ceiling and NTE figures are non-binding financial estimates that cannot alter underlying pricing (app. reply at 14, 20). This argument misapprehends our textual analysis. Our conclusion does not rest upon the dollar amount assigned to a ceiling; it rests upon the express line-item designation chosen by the parties in the text of the modification. Section B of the contract expressly ties each task order's pricing to the rate schedule of the CLIN under which it is placed. Because the written terms of the modifications assigned all hurricane-response work to CLIN 2001, the plain language of Section B mandates that the CLIN 2001 (OY2) rate schedule governs.

As the Federal Circuit observed, the parties' continuing transfers of funds into CLIN 2001, even during OY3, "may inform the Board's interpretation that task order's pricing remains fixed to the CLIN it is issued under" for the duration of performance. *Id*. at *6. Read together, the original contract and its bilateral modifications yield a single, unassailable textual interpretation: work assigned to CLIN 2001 is priced at OY2 rates.

Second, WSP argues that the modifications only adjusted funding and ceiling, never the Attachment 1 rate schedule, and therefore carry no implications for pricing. We recognize, of course, that these are distinct contractual mechanisms serving different functions. An adjustment to funding does not automatically rewrite the rate schedule and a ceiling modification does not by itself commit appropriations or alter underlying rates. *See WSP USA Sols. Inc.*, 2025 WL 573242 at *18, *20 (noting that

administrative funding transfers to previous CLINs to prevent exceeding NTE ceilings do not automatically dictate or alter which underlying rate schedule applies). But as we have explained, our interpretation turns on the line item under which the parties placed the work, not the dollar amount of the ceiling. Because Section B ties a task order's pricing to the rate schedule of its funding CLIN, funding the work under the OY2 line item (CLIN 2001) via bilateral modification contractually anchored the pricing to OY2 rates.

Third, WSP points to the contract's status as a requirements contract and argues that the defining feature of a requirements contract – the government's obligation to fill all its requirements from the contractor during each specified period at the agreed price, compels the conclusion that rates must follow the period of performance. *See Medart, Inc. v. Austin*, 967 F.2d 579, 581 (Fed. Cir. 1992) (holding that requirements contract calls for the government to buy all its requirements during the contract period from the contractor, who agrees to provide them at the agreed price). The requirements-contract framework provides context, but does not dictate how pricing is applied when a task order issued in one option year generates performance in the next. The task order modifications issued during OY3 were not new, freestanding orders; they were administrative vehicles used to extend the duration and funding of the original task orders already placed under CLIN 2001 during OY2. This distinction is anchored in the statutory framework of 10 U.S.C. § 3403(e) and 41 U.S.C. § 4103(e), which are identical and provide that: "A task or delivery order may not increase the scope, period, or maximum value of the task or delivery order contract under which the order is issued. The scope, period, or maximum value of the contract may be increased only by modification of the contract."

This framework establishes a strict legal hierarchy: just as a task order is subordinate to its parent contract, a modification to a task order is strictly subordinate to the foundational terms established when that original order was issued. *See TPMC-Energy Sols. Env't Servs. 2008, LLC v. United States*, 176 Fed. Cl. 56, 123 (2025) (holding that all task orders and modifications executed under a contract are subject to the applicable terms and conditions of the contract). Here, the foundational terms of the task orders were locked in during OY2. When the government modified these orders during OY3 to add days of service, each modification explicitly directed that "[a]ll other terms and conditions remain unchanged" (finding 38). WSP's contention that 382 days of service were "ordered" during OY3 is of no legal import. *See Texas Instruments, Inc. v. United States*, 922 F.2d 810, 816 (Fed. Cir. 1990) (holding that a negotiated price agreement is final and binding and not subject to unilateral revocation by the government). Legally, those 382 days were not newly ordered under an OY3 pricing regime; they were simply added to an existing OY2 order whose pricing terms were statutorily and contractually required to remain unchanged. The government's obligation under this requirements contract was to purchase all its emergency power requirements from WSP during each exercised period; the dispute is over the *rate*

applicable to that performance, not whether WSP would be used to fill the requirement.

Fourth, WSP contends the government's interpretation is illusory, suggesting it would allow the government to unilaterally force a contractor to perform at lower rates (app. br. at 9 n.1; 16). This argument ignores the most critical fact of this case: the modifications were bilateral. A promise is illusory where one party retains unlimited discretion. *See Torncello v. United States*, 231 Ct. Cl. 20, 27 (1982) (holding that "a party may not reserve to itself a method of unlimited exculpation without rendering its promises illusory and the contract void . . . ."); *see also Crewzers Fire Crew Transp., Inc. v. United States*, 741 F.3d 1380, 1383 (Fed. Cir. 2014). For this reason, WSP's reliance on *Stockton East Water Dist. v. United States*, 583 F.3d 1344 (Fed. Cir. 2009), is misplaced. In *Stockton*, the Government attempted to read an inherent, unilateral right into the contract to alter its performance obligations based on subsequent shifts in federal policy. 583 F.3d at 1357. The court rightly rejected that unilateral exculpation as illusory. *Id.* Here, the government does not assert such unilateral power. The government's discretion was limited by the need to obtain WSP's signature. By agreeing to the modifications, WSP provided its assent, making the action mutual and rendering the illusoriness argument inapplicable.

Fifth, WSP contends that its bilateral signatures cannot be read as a release or waiver of its claim to OY3 rates, because no modification contained release language (app. br. at 26). It relies upon *CTA Inc.*, ASBCA No. 47062, 00-2 BCA ¶ 30,947 at 152,754, and *Vectrus Sys. Corp.*, ASBCA No. 63239, 2024 WL 259731 (Jan. 4, 2024). We do not hold that WSP released or waived an accrued claim by signing the modifications. Instead, the signatures matter because they make the modifications bilateral terms of the contract, and the contract as so modified fixes pricing to the CLIN under which the work was funded. The question is one of contract interpretation, not release.

WSP's remaining authorities fare no better. WSP's reliance on *RGI, Inc.*, ASBCA No. 38772, 93-2 BCA ¶ 25,581 at 127,401, is unavailing (app. reply at 8). The Board in *RGI* addressed whether preliminary, non-binding documents constituted an "order." Here, the issue is different: whether a modification to an existing, active task order constitutes a new, freestanding order. We find that it does not. The modifications here were expansions of work already underway and their express statement that "all other terms and conditions remain unchanged" confirms their status as extensions of the original OY2 orders, not new orders that would trigger a different pricing schedule.

WSP's reliance on *Symetrics Indus., LLC*, ASBCA No. 58001, 15-1 BCA ¶ 35,997, is also misplaced (app. reply br. at 12-13). *Symetrics* involved hard per-CLIN quantity maximums that were exceeded when the Contracting Officer (CO)

issued delivery orders for quantities beyond contractually specified limits without contemporaneous option-exercise paperwork. 15-1 BCA ¶ 35,997 at 175,856. The Board held that the CO's subsequent acceptance of those over-maximum deliveries constituted ratification, entitling the contractor to the higher next-option rates. *Id*. at 175,858. Here, by contrast, there were no analogous per-CLIN quantity maximums that were exceeded; every ceiling increase and funding augmentation was the subject of a bilateral modification that expressly allocated the additional capacity to CLIN 2001 and preserved OY2 pricing. Moreover, unlike the contractor in *Symetrics*, who merely received and fulfilled unilateral delivery orders, WSP affirmatively executed dozens of bilateral modifications without reservation, invoiced at the lower OY2 rates for more than nine months, and only sought higher rates long after the course of performance had been firmly established by mutual assent. The unauthorized ordering facts that drove the *Symetrics* outcome are therefore absent here.

Finally, we note an internal tension in WSP's position on the relationship between CLINs and rates. Before the Federal Circuit, WSP argued that Section B required unexpended amounts remaining from CLIN 2001 to automatically "roll over" to CLIN 3001, an argument that presupposes CLIN funding is tied to a corresponding option year's rates. *WSP USA Sols. Inc.*, 2025 WL 573242 at *8. On remand, WSP argues that CLIN funding bears no relationship to the applicable rate schedule (app. br. at 19, 21, 25-26). WSP cannot have it both ways: it cannot argue that the NTE roll-over provision links CLINs to option-year pricing when that linkage favors its position, and then argue that CLINs and rates are unrelated when the CLIN-assignment pattern in the modifications cuts against it. This inconsistency undermines WSP's effort to sever the relationship between CLIN assignments and pricing.

We therefore conclude, on the basis of the text of the contract as bilaterally modified, that the pricing for each task order was established at the time of issuance and remained fixed for the duration of performance under that order, even where performance extended into a later option year. Although this textual analysis is sufficient to resolve the appeal, we address in the alternative the parties' course of performance and WSP's waiver, each of which independently confirms the government's interpretation.

III.The Parties' Course of Performance Establishes OY 2 Pricing

The parties' course of performance is not necessary to interpret the plain meaning, but it independently and powerfully confirms it and is itself among the most probative evidence of the meaning the parties gave their contract. *See Metropolitan Area Transit, Inc. v. Nicholson*, 463 F.3d 1256, 1260 (2006) (holding that "the parties' own course of performance is highly relevant to contract interpretation"); *Jemison & Partners, Inc.*, ASBCA No. 62928, 23-1 BCA ¶ 38,249 at 185,737; *see also Aegis Def. Services, LLC*, ASBCA No. 59082, *et al.*, 17-1 BCA ¶ 36,915 at 179,856, citing

Blinderman Constr. Co. v. United States, 695 F.2d 552, 558 (Fed. Cir. 1982) (contemporaneous construction of an agreement prior to dispute is entitled to great weight). Indeed, the parties' course of performance is completely consistent with the language of the contract as modified: both parties treated OY2 pricing as governing all hurricane response work, and did so consistently, bilaterally, and for an extended period. The bilateral modifications allocating the work to CLIN 2001, WSP's invoicing at OY2 rates for more than nine months, the parties' joint correction of an erroneous CLIN 3001 funding assignment, and WSP's own contemporaneous internal communications together demonstrate a shared contemporaneous understanding that OY2 pricing governed the hurricane response work. We address each in turn and then respond to WSP's counterarguments.

A. Internal Documents and Contemporaneous Intent

Both parties held an identical understanding of the modifications when the modifications were executed. Government procurement documents supporting the November 2017 ceiling increase specifically noted that the hurricane missions "remain active in option period 2" and that "option periods 3 and 4 will not be utilized" (finding 42). WSP's Vice President, Mr. Ricevuto testified that WSP's execution of each bilateral modification adding funds to option period 2 was deliberate and authorized by senior executive management (finding 48). Although unilateral internal records cannot alter the plain meaning of the contract, here, the contemporaneous evidence, prior to the dispute, demonstrates a shared understanding that the task orders would be funded using option period 2. *See Aegis*, *17*-1 BCA ¶ 36,915 at 179,856.

B. WSP's Invoicing and Daily Expenditure Reports

WSP's invoicing conduct further confirms our reading of the modified contract. For more than nine months, from the inception of the task orders in September 2017 through at least July 2018, WSP submitted every invoice and every Daily Expenditure Report (DER) applying the OY2 unit rates from Attachment 1 to calculate amounts due, and the government reviewed those DERs for accuracy. This detail matters because WSP argues that CLIN assignments reflect only funding mechanics, not pricing decisions (app. br. at 19-22). Even accepting that framework, the DER record refutes it: WSP was not simply booking costs to OY2 accounts, it was calculating what it was owed using OY2 rates. A party that genuinely believed it was being systematically underpaid by approximately three percent on every invoice would reasonably raise the issue promptly. WSP did not assert any claim to OY3 pricing until July 23, 2018, more than nine months after OY3 began, by which point WSP had signed twenty-three modifications and submitted dozens of invoices without a word of protest (findings 37, 44).

C. The Task Order No. 3001 Correction

One episode is particularly telling. When Task Order No. 3001's funding was initially obligated to CLIN 3001 – exactly the CLIN assignment that would have been consistent with WSP's current position – the parties executed a modification to correct the error, moving the funds back to CLIN 2001. WSP signed that correction without objection. (Finding 39) The fact that WSP characterized CLIN 3001 funding as an error requiring correction, rather than as a windfall to be preserved, further confirms the parties' intentions.

D. WSP's Internal Communications

WSP's own internal communications foreclose any argument that the foregoing conduct was inadvertent or the product of confusion. Following USACE's rejection of its claim, WSP's personnel acknowledged that WSP "went along with it and didn't challenge it" and recognized that "the general contract law principle is that a contractor's silence, in the face of an improper option exercise, is acceptance." (Finding 46) An internal WSP email to its Vice President, Mr. Ricevuto, described the pursuit of OY3 pricing as a "Hail Mary," candidly conceded that USACE's characterization of WSP as a large and sophisticated company that "easily had the means to catch this mistake" was accurate -- "And we are" – and suggested that WSP would need a "good story about the fog of war" to justify its prolonged silence (findings 46-47). This language does not demonstrate a contemporaneous interpretation of the contract to require OY3 pricing: instead, it is the language of a party that understood OY2 pricing applied and later devised a litigation strategy to seek additional compensation. *Cf. Perry & Wallis, Inc. v. United States*, 427 F.2d 722, 725 (Ct. Cl. 1970) (recognizing that a party who performs without protest while knowing the other party's interpretation is bound by it and cannot later claim a different understanding). The further fact that WSP, during the very period it now claims was a "fog of war," was simultaneously negotiating lower subcontractor rates for the sustainment phase of the mission confirms that this was not a company too overwhelmed to attend to contractual details (finding 50).

Taken together, the bilateral modifications, the invoicing record, the Task Order No. 3001 correction, the nine-month delay, and WSP's own internal admissions constitute an overwhelming, mutually consistent body of course-of-performance evidence. That evidence confirms what the contract, read as a whole and as modified, already establishes: pricing for each task order was established at the time of issuance and remained fixed for the duration of performance under that order, even where performance extended into a later option year. Because the contract text alone supplies that answer, this confirming evidence is not necessary to our conclusion, though it removes any doubt about it.

IV. The Doctrine of *Contra Proferentem* Is Inapplicable

WSP argues that any remaining ambiguity must be resolved in its favor under the doctrine of *contra proferentem* (app. br. at 26-30). This argument fails for two independent and dispositive reasons.

First, *contra proferentem* is a "rule of last resort" that applies only when a genuine ambiguity remains after all other interpretive tools, including extrinsic evidence, have been exhausted. *See HPI/GSA 3C, LLC v. Perry*, 364 F.3d 1327, 1334 (Fed. Cir. 2004). As established above, the contract, as modified, is not ambiguous as to the disputed pricing question and the bilateral modifications placed all of the hurricane response work, its funding, and its ceiling under the Option Year 2 line item (CLIN 2001). The parties' subsequent course of performance, including the bilateral execution of dozens of modifications funding CLIN 2001 and WSP's nine months of invoicing at OY2 rates, provides clear and compelling evidence of a mutual intent to price all hurricane work under the OY2 framework and independently our reading of the contract as modified. In the absence of a contractual ambiguity, there is nothing left for the rule of *contra proferentem* to resolve.

Second, even if the ambiguity had not been resolved, a contractor seeking to invoke *contra proferentem* must show, among other things, that it "actually and reasonably construed" the contract in accordance with its proffered interpretation. *See HPI/GSA 3C, LLC v. Perry*, 364 F.3d 1327, 1334-35 (Fed. Cir. 2004) (quoting *W. Contracting Corp. v. United States*, 144 Ct. Cl. 318, 326 (1958)). WSP's own conduct demonstrates that it did not. A contractor that invoiced exclusively at OY2 rates for nearly a year, signed numerous modifications affirming the OY2 funding structure, and internally characterized its subsequent claim for OY3 rates as a "Hail Mary" cannot credibly assert that it "actually and reasonably" interpreted the contract to require OY3 pricing during the period of performance. WSP's conduct during performance is inconsistent with a contemporaneous understanding that OY3 pricing applied.

V. Alternatively, WSP Waived Its Claim by Failing to Provide Timely Notice

Although our conclusion on the merits is fully dispositive of this appeal, we note that even assuming arguendo that WSP's post-hoc theory was correct. *i.e.*, that performing OY3 work at OY2 rates constituted a constructive change, WSP waived any such claim by failing to give timely notice under the contract's Changes clause. USACE's affirmative defense of waiver therefore provides an independent ground for denial.

If WSP genuinely believed that performing OY3 work at OY2 rates constituted a constructive change to the contract, it was obligated under the contract's "Changes"

clause to provide timely written notice of its intent to seek an equitable adjustment (finding 33). As the Federal Circuit observed, if WSP disagreed with the terms of the modifications, its "proper course of action" was to refuse to sign them or to submit a timely claim. 2025 WL 573242 at 10 n.8.

WSP did neither. Instead, it performed for over nine months without protest, signed modifications affirming the OY2 funding structure, and submitted invoices consistent with it (findings 37-45). This prolonged silence is not merely a procedural defect; it constitutes a classic waiver. *See Community Consulting International*, 02-2 BCA ¶ 31,940 at 157,787-88 (a contractor who executes a bilateral modification without expressly reserving its rights waives future claims). Moreover, the notice requirements of the Changes clause are explicitly designed to afford the government an opportunity to investigate claims, control costs, or consider alternative courses of action. *K-Con Building Systems, Inc. v. United States*, 778 F.3d 1000, 1010 (Fed. Cir. 2015) (notice provision prevents surprise and gives government a chance to control costs). When a contractor fails to provide timely notice before the government suffers prejudice by losing these opportunities, the claim is barred. *See Calfon Constr., Inc. v. United States*, 18 Cl. Ct. 426, 438 (1989) ("Written notice as to constructive changes must be supplied by the contractor before such time that the Government would suffer if not apprised of the facts."); *Hoel-Steffen Constr. Co. v. United States*, 456 F.2d 760, 767-68 (Ct. Cl. 1972) (finding contractor gave adequate notice of delays and disruptions it was experiencing, as required by suspension of work clause, and was therefore entitled to have its claim considered).

By withholding its claim until July 2018, long after the parties had mutually established a clear course of dealing, WSP fundamentally deprived the government of the opportunity to mitigate its exposure or alter its acquisition strategy. A contractor cannot silently perform in a manner that manifests unambiguous assent to the government's position, only to later claim it disagreed all along. WSP's July 2018 notice was simply too little, too late, and it has therefore waived its right to claim a constructive change.

CONCLUSION

We find that the contract, as modified, is not ambiguous as to the disputed pricing question and that the bilateral modifications placed and continued all of the hurricane response work, its funding, and its ceiling under the Option Year 2 line item (CLIN 2001). Read together with the contract's own direction that pricing for each item follow "the corresponding rate schedule," the contract as a whole allows for only one reasonable interpretation: that the disputed work is priced at Option Year 2 rates.

The parties' subsequent course of performance independently confirms this conclusion.

The appeal is denied.

Dated: September 1, 2026

KENNETH D. WOODROW
Administrative Judge
Armed Services Board
of Contract Appeals

I concur

J. REID PROUTY
Administrative Judge
Acting Chairman
Armed Services Board
of Contract Appeals

I concur

DAVID D'ALESSANDRIS
Administrative Judge
Vice Chairman
Armed Services Board
of Contract Appeals

I certify that the foregoing is a true copy of the Opinion and Decision of the Armed Services Board of Contract Appeals in ASBCA No. 62674, Appeal of WSP USA Solutions Inc., rendered in conformance with the Board's Charter.

Dated: September 2, 2026

PAULLA K. GATES-LEWIS
Recorder, Armed Services
Board of Contract Appeals