UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

DENIED: May 26, 2016

CBCA 4776

CAE USA, INC.,

Appellant,

v.

DEPARTMENT OF HOMELAND SECURITY,

Respondent.

Joseph P. Hornyak and Gregory R. Hallmark of Holland & Knight LLP, Tysons Corner, VA, counsel for Appellant.

William H. Butterfield and Julia A. LoBosco, U.S. Coast Guard, Department of Homeland Security, Washington, DC, counsel for Respondent.

Before Board Judges **DANIELS** (Chairman), **WALTERS**, and **LESTER**.

LESTER, Board Judge.

Appellant, CAE USA, Inc. (CAE), seeks to recover the costs that it incurred in developing a full-motion flight simulator (FFS), which it had planned to use to provide avionics training services under an indefinite-delivery/indefinite-quantity (IDIQ) contract with the United States Coast Guard (Coast Guard). Under the IDIQ contract, CAE had to use FFSs, which CAE was to furnish, to provide training for two different kinds of aircraft, the HC-130H and an upgraded version of that aircraft, the Avionics 1 Upgrade (A1U). The Coast Guard ordered a sufficient quantity of HC-130H aircraft training services to satisfy its

minimum ordering obligations under the contract, but it never ordered any A1U services because it canceled the A1U program.

CAE does not complain about the Coast Guard's failure to order any A1U training services. Nevertheless, it argues that, under the contract, the Coast Guard was required to provide (as Government-furnished equipment (GFE)) a set of A1U avionics that CAE would incorporate into one of its FFSs. Although the Coast Guard delivered the A1U avionics package to CAE, the Coast Guard requested its return soon after canceling the A1U program. CAE argues that it was entitled to hold the A1U avionics package throughout the life of the IDIQ contract (including option years), even if the Coast Guard did not order any A1U services, and that the Coast Guard's breach of CAE's possessory rights precluded CAE from earning income through the provision of A1U training services to third parties. CAE further argues that, even if the contract language itself does not provide it with an absolute right to keep the A1U avionics for the life of the contract, the Coast Guard breached its implied duty of good faith and fair dealing, either by not allowing CAE to continue to hold the avionics or by failing to provide CAE with greater information about the possibility that the Coast Guard might cancel the A1U program (so that CAE could have avoided the costs of developing its FFS). As a damage for the Coast Guard's breach, CAE seeks to recover more than $8 million in costs that it incurred in developing its FFS.

Both parties have filed motions for summary relief, and, with limited exception, neither party has contested the other's statement of uncontested facts. After studying the parties' briefs, as well as the provisions of the contract at issue and the relevant case law, we must deny CAE's motion and grant summary relief to the Coast Guard.

Statement of Facts

The History of the HC-130H Aircraft and the A1U Development

1. The HC-130H, the Coast Guard's Long Range Surveillance legacy aircraft, has been in service for more than thirty years. Respondent's Statement of Uncontested Facts (RSUF) ¶ 1 (citing Appeal File, Exhibit 3 ¶ 1.2).

2. Since at least 2008, CAE was the incumbent contractor under contract no. HSCG23-08-D-PBR005, providing simulator and other related training to the Coast Guard on the HC-130H aircraft. RSUF ¶ 3; Appellant's Statement of Uncontested Facts (ASUF) ¶ 3; Exhibit 6 at 4.

3. In early 2010, CAE issued a press release announcing that it had developed "a new C-130H full-mission simulator," featuring "C-130 glass cockpit avionics systems" that

CAE "offers to C-130 operators considering avionics modernization programs for existing C-130 Hercules aircraft." RSUF ¶ 4; Exhibit 1 at 1. In the press release, CAE indicated that its Tampa training center had "three C-130E/H reconfigurable full-mission simulators" and that it had "the largest installed base of civil and military full-flight simulators and training devices" in the world. RSUF ¶ 4; ASUF ¶ 10; Exhibit 1 at 1.

4. An FFS is a complex device used to train pilots and other aircrew by simulating the experience of flying a real airplane. ASUF ¶ 1. An FFS generally consists of an enclosed capsule that contains a mock cockpit, an elevated platform on which the cockpit sits, and machinery that makes the cockpit and platform turn, tilt, and make other movements. *Id.* The cockpit contains displays and controls designed to represent the appearance and workings of a real aircraft, and the instruments in the cockpit include avionics equipment. *Id.* "Avionics" are electronic systems used on aircraft and include communications, navigation, flight control, and many other systems. *Id.*

5. The Coast Guard needed to prolong the life of its aging HC-130H aircraft fleet. To this end, the Coast Guard undertook a program known as the A1U project, which was intended to keep the HC-130H viable and operational until 2027. RSUF ¶ 5; Exhibit 2 at 1.

The Solicitation of HC-130H and A1U Training Services

6. On or about July 26, 2010, the Coast Guard posted a synopsis of its intent to award a sole source contract to CAE, through which CAE would "incorporate the A1U's glass cockpit" into its ongoing HC-130H training services. RSUF ¶ 6. The 2010 synopsis was an effort to add A1U upgrade training to CAE's existing contract. *Id.*

7. When the synopsis was published, other potential offerors expressed an interest in performing the A1U training work. RSUF ¶ 7. The Coast Guard contracting officer determined that, because of that expressed interest from capable bidders, it would be inappropriate to amend CAE's contract to add the A1U work on a sole source basis. *Id.*

8. On October 26, 2011, the Coast Guard issued request for proposals (RFP) no. HSCG23-12-R-PBR006, soliciting offers for its training requirements related to the HC-130H aircraft. Exhibit 3, Attachment 1 at 1 ¶ 1.1; *see* RSUF ¶ 8; ASUF ¶ 4. It required training on *both* the standard HC-130H and the upgraded HC-130H (A1U). Exhibit 3 at 2-35; RSUF ¶¶ 8, 9; ASUF ¶ 5.

9. The RFP contemplated the award of an IDIQ contract, with a guaranteed minimum order value of $25,000. Exhibit 3 at 2.

10. The RFP provided that the awardee would have to provide and utilize an FFS as contractor-furnished property for each training course that the contract permitted the Coast Guard to order:

> 4.0 CONTRACTOR FURNISHED PROPERTY.
>
> The Contractor shall furnish all facilities, materials, equipment and services necessary to fulfill the requirements of this contract, except for the Government Furnished Resources as specified in this work statement.
>
> .....
>
> 4.3 The contractor will furnish a Full Motion Flight Simulator (FFS) for the simulator phase of instruction for each course outlined below. The FFS shall be a faithful representation of the HC-130H & A1U cockpit. The FFS will comply with FAA designation of "Level C" fidelity at a minimum.

Exhibit 3, Attachment 1 at 8 ¶ 4.0; *see* RSUF ¶ 10. Because the avionics for the A1U are very different from the standard HC-130H avionics, the same FFS could not be used to train for both the A1U and the standard HC-130H aircraft. ASUF ¶ 9. Accordingly, under the RFP, the contractor would need to have an FFS for A1U training and another FFS for standard HC-130H training. *Id.*

11. To provide FFS training for the A1U variant of the HC-130H, a set of avionics particular to the A1U variant would have to be incorporated into an FFS. ASUF ¶ 7. Accordingly, the RFP stated that the Government would provide the upgraded avionics package as GFE twelve months before the required start date of any A1U-specific training courses, which the contractor would then install into the contractor-provided FFS:

> 3.0 GOVERNMENT FURNISHED PROPERTY/MATERIALS:
>
> The Government will provide the following resources and information to the Contractor for work required under this contract:
>
> .....
>
> 3.3 The Contractor will be provided A1U GFE twelve months prior to the required start date of A1U specific training courses. The A1U GFE will consist of:

> 3.3.1 Two ship sets for installation in FFS and FTD [flight training device]. A1U ship sets will be installed by the training contract provider.
>
> .....
>
> 3.3.3 Three complete sets of ANVS-9 [Night Vision Goggles] for Mission/Operational Training

Exhibit 3, Attachment 1 at 7-8 ¶ 3.0; *see* RSUF ¶ 11; ASUF ¶ 7.

12. The RFP identified the following requirements for A1U co-pilot initial training, but indicated that training classes would not commence until twelve months after the Government had delivered the A1U GFE pursuant to an individual task order:

> 5.4 C130(A1U) CO-PILOT INITIAL TRAINING (502374).
>
> The contractor shall provide a co-pilot initial ground course that successfully trains Coast Guard personnel to fly as Co-pilots in C130A1U aircraft. The Contractor shall provide Co-Pilot students with classroom, CBT [computer-based training], FTD, and FFS training on the C-130(A1U) aircraft.
>
> .....
>
> 5.4.2 Course Convening: The Contractor shall provide up to 5 training classes to teach up to 20 co-pilots per year. Each class will consist of two, three, or four students. *Training classes will commence twelve months after delivery of A1U specific Government Furnished Property which will be provided under an individual task order*. (see paragraph 3.0 GOVERNMENT FURNISHED PROPERTY/MATERIALS).

Exhibit 3, Attachment 1 at 12 ¶ 5.4 (emphasis added); *see* RSUF ¶ 11. The contract contained the same twelve-month lead time for delivery of A1U GFE prior to the provision of A1U requalification/first pilot ground training, A1U flight engineer class training, A1U instructor pilot ground school training, A1U transition training, and A1U proficiency (P-course) training. *Id.* at 13, 15, 18-20.

13. In the Questions and Answers (Q&A) to the RFP, which became a part of the solicitation, the Coast Guard answered the following question from CAE about whether, once

the A1U GFE was loaded into the successful contractor's FFS, the contractor could use it to train other entities:

> Can the full motion simulator using the [A1U] GFE be used to train other customers?
>
> A: Operationally, the GFE can be used to train other customers on a "not to interfere" basis.

Exhibit 4 at 1; *see* ASUF ¶ 16. CAE has represented, and the Coast Guard has not disputed, that other potential customers for A1U FFS training included private air cargo services and foreign militaries such as the Royal Thai Air Force, the Republic of Singapore Air Force, the Royal New Zealand Air Force, and Lynden Air Cargo. ASUF ¶ 15.

14. CAE submitted the only proposal in response to the RFP. RSUF ¶ 12. In its proposal, CAE indicated that it had "over 60 years of experience in providing cutting-edge simulation products and training services" and represented that it "will furnish two FFSs as part of this contract. One will represent the C-130H and the other a C-130H A1U configuration to be used for the simulator phase of instruction for each of the courses." Exhibit 6 at 2, 10; *see* RSUF ¶ 12; ASUF ¶ 9. CAE represented in its proposal that, "[f]or C-130H A1U aircrew training courses, CAE will develop and provide a new FFS to have a faithful representation of the A1U cockpit," rather than use one of its existing FFSs. Exhibit 6 at 11; *see* ASUF ¶ 13.

15. In its statement of uncontested facts, CAE asserts that, although it originally had three simulators available to it, it had no choice but to develop a new FFS for the A1U work because it had sold one of its three FFSs, it needed to use one for the standard HC-130H training, and reconfiguring the third to accommodate A1U would not have been cost effective. ASUF ¶¶ 10-12. CAE also represents that, when preparing its proposal, it determined that, because of the large investment needed to build a new FFS, the contract at issue would not be economically feasible if the contractor could only train the Coast Guard on the A1U FFS, so it relied on the Coast Guard's representation in response to Q&A no. 1 as a guarantee that it would be able to use the A1U GFE on a "not to interfere" basis to train other customers over the course of the five-year life of the contract. ASUF ¶¶ 14, 18. CAE does not allege any verbal representations by the Coast Guard to that effect, but relies solely on the Q&A as the basis of the guarantee. Absent that guarantee, CAE asserts, it would not have submitted a proposal for the contract. *Id.* ¶ 18. Although CAE's proposal indicated that CAE would build a new FFS for the A1U work, CAE did *not* explain in the proposal the reason that it decided to develop a new FFS or indicate that CAE's proposal was dependent

upon its ability to use the A1U GFE for outside training purposes for a five-year period. *See* Exhibit 6.

The Contract

16. On or about July 20, 2012, the Coast Guard awarded to CAE contract no. HSCG23-12-D-PBR006, a one-year IDIQ contract with four one-year options and a total guaranteed minimum order value of $25,000:

> This is an Indefinite Delivery Indefinite Quantity (IDIQ) type contract consisting of a one (1) year base period with four (4) one-year options will be awarded [sic]. The guaranteed minimum value for this contract is $25,000. The total estimated maximum amount of this contract shall not exceed $11,910,605. The Contractor will provide a series of courses designed to provide Coast Guard personnel, HA-130H/A1U aircrew training, and HC-130H/J & HC-144 Loadmaster training in accordance with the Performance Work Statement.

Exhibit 7 at 2; *see* RSUF ¶ 13; ASUF ¶ 20. The contract's "Option to Extend the Term of the Contract" clause, using the language from Federal Acquisition Regulation (FAR) 52.217-9, 48 CFR 52.217-9 (2012), provided as follows regarding extension of the IDIQ contract beyond one year:

> (a) The Government may extend the term of this contract by written notice to the Contractor within 30 days; provided that the Government gives the Contractor a preliminary written notice of its intent to extend at least 30 days before the contract expires. The preliminary notice does not commit the Government to an extension.
>
> (b) If the Government exercises this option, the extended contract shall be considered to include this option clause.
>
> (c) The total duration of this contract, including the exercise of any options under this clause, shall not exceed five (5) years.

Exhibit 7, Attachment 1 at 50. As for the minimum order value, the RFP did not guarantee a specific minimum quantity for each type of training identified in the contract (for example, $25,000 for HC130-H training, and $25,000 for A1U training), but instead only guaranteed an aggregated minimum quantity of services without specifying which of the services covered by the contract the Coast Guard would order. *See id.*

17. Consistent with the RFP, the contract required CAE to provide and utilize an FFS as contractor-furnished property for each training course provided under the contract. Exhibit 7, Attachment 1 at 7-8 ¶ 4.0. Further, the contract required the Government to provide CAE with an upgraded A1U avionics package as GFE twelve months before the required start date of any A1U-specific training courses. Exhibit 7, Attachment 1 at 7, 11 ¶¶ 3.0, 5.4. Other than its reference to that twelve-month window, the contract did not identify any specific date by which the Coast Guard had to deliver the A1U avionics package to CAE. *See id.*

Contract Performance

18. The guaranteed contract minimum was achieved upon contract execution, and, to date, the Coast Guard has ordered more than $3 million in services from CAE under the contract. RSUF ¶ 14.

19. In September 2012, the Coast Guard initiated a regular weekly meeting of the "A1U Team," which consisted of Navy, Coast Guard, and various contractor personnel supporting the development of the A1U FFS. ASUF ¶ 22.

20. By early July 2013, the Coast Guard knew that it was likely to cancel the A1U upgrade program and not order any A1U training services under CAE's IDIQ contract. ASUF ¶ 23. On July 1, 2013, a third-party contractor on the A1U Team notified CAE and others that the weekly meetings of the A1U Team were canceled "until further notice." Exhibit 38 at 1; *see* ASUF ¶ 23(a). Then, on July 3, 2013, CAE received an email message informing it that a Coast Guard solicitation seeking proposals for maintenance training for A1U aircraft was being canceled, although the message indicated that "[t]he solicitation for the A1U may at some point go forward with another component at [the Coast Guard]." Exhibit 40 at 1; *see* ASUF ¶ 23(c). Further, that same day, CAE received a copy of an email message from a Navy representative indicating that there was a "USCG C130H Program Change" and that there was a "new direction from the [Coast Guard] in regards to the C130H program" that involved stopping all but a few efforts on the A1U program. ASUF ¶ 23(d). In response to CAE's subsequent question as to whether this change in direction would affect CAE's contract, the Coast Guard contracting officer represented that he was not aware of any formal decisions to cancel the A1U program:

> I apologize for your being included on pre-decisional internal Government emails. I have no further information related to the subject of the email. I am not aware of any formal decisions. Therefore it would not be proper for me to speculate or prognosticate. If and when there is a need for any contractual

> changes the information will come from a [contracting officer] or a [contract specialist].

Exhibit 39 at 1; *see* ASUF ¶ 23(e). Subsequently, on July 11, 2013, CAE asked for a telephone conference to discuss the status of the A1U contract, ASUF ¶ 23(b), but the contracting officer responded that "at this moment there is nothing to discuss. We have a C-130 Training contract with a few A1U courses. I will contact [another office] to determine issues related to GFE." Exhibit 41 at 1.

21. On October 10, 2013, CAE asked the contracting officer whether the Coast Guard was "still planning on scheduling courses in the A1U simulator." Exhibit 44 at 1. CAE indicated that, "[w]hen we last talked, there were some rumors about the A1U program being cancelled." *Id.* CAE further expressed its concern that the Coast Guard and the Navy had "cancelled the weekly [A1U Team] meetings," which had "not been rescheduled." *Id.* CAE indicated its understanding that "there was some sort of [Coast Guard] decision" about the A1U program "that was to be made by the end of September." *Id.* CAE stated that "[w]e are moving forward 100% with the development" of the A1U FFS, but that, "for planning purposes, we need to know the [Coast Guard's] expectation for upcoming A1U specific courses." *Id.* The contracting officer responded by saying that he had no funds for any future courses at that moment, but that he was working to provide CAE with the A1U GFE, that he had not been told to stop doing that, and that he did not know anything else at that point. *Id.*

22. By mid-October 2013, CAE had received more than ninety-five percent, although not all, of the GFE under the contract. Exhibit 45 at 3. On November 6, 2013, the Coast Guard delivered the final components of the A1U GFE to CAE. Complaint ¶ 33; Answer ¶ 33; Exhibit 25 at 6.

23. In December 2013, Congress passed, and the President signed, the National Defense Authorization Act for Fiscal Year 2014, which effected substantial changes to the Coast Guard's fleet of aircraft. RSUF ¶ 15; Exhibit 10. The Act required the Coast Guard to transfer seven HC-130H aircraft to the United States Forest Service (through the United States Department of the Air Force (Air Force)) and required the Air Force to transfer fourteen C-27J aircraft to the Coast Guard. Exhibit 10 at 23. The C-27J aircraft performs essentially the same function (maritime surveillance) as does the HC-130H aircraft. RSUF ¶ 15.

24. Given the new mix of aircraft mandated by the Act, the Coast Guard made several program decisions concerning such issues as logistics, training, maintenance, and the overall deployment of its revised aircraft fleet. RSUF ¶ 16; Exhibit 15. One of those

decisions, which the Vice Commandant of the Coast Guard made on March 19, 2014, was to "cancel the HC-130H Avionics One Upgrade (A1U)." Exhibit 15 at 3, 18; *see* RSUF ¶ 17.

25. Five days later, on March 24, 2014, the Coast Guard contracting officer notified CAE by email message that the Coast Guard had canceled the A1U program, meaning that it would no longer need A1U training services:

> I've received word that the A1U program has been cancelled. That would mean there is no longer a need for A1U training under your pilot training contract from the [Coast Guard]. We are not aware of other US customers planning to use A1U at this time. Please respond to this email should you have questions.

Exhibit 16 at 1; *see* RSUF ¶ 18; ASUF ¶ 25.

26. In response, a CAE representative asked whether the Coast Guard would follow up with a formal notification partially terminating the contract for convenience. Exhibit 17 at 3. The contracting officer questioned "[w]hat specifically would be terminated," given that "[t]here is no obligation to order those [A1U] courses." *Id.* Following a verbal conversation, the contracting officer on March 26, 2014, informed CAE by email message that the Coast Guard would be withdrawing the A1U GFE and that, if CAE viewed that as compensable, it should submit something in writing. *Id.* at 1. He indicated that, although the Coast Guard was removing the A1U GFE, "the remainder of the contract will remain unchanged." *Id.*; *see* RSUF ¶ 19.

27. In late April 2014, the Coast Guard picked up the A1U equipment from CAE's facility. RSUF ¶ 20; ASUF ¶ 26.[1]

The Claim and Appeal

28. On July 17, 2014, CAE submitted a request for equitable adjustment (REA) to the Coast Guard contracting officer "for the costs incurred for the procurement of the GFE replacement parts removed from the FFS." Exhibit 23 at 2; *see* RSUF ¶ 21. CAE asserted that, when it learned in March 2014 that the A1U program was canceled, its "A1U simulator

[1] Oddly, the appeal file seems to indicate that, as of July 8, 2014, CAE was still in the process of packaging the A1U GFE for a pick-up later that month. *See* Exhibit 18 at 1. Nevertheless, the parties have stipulated to the April 2014 pick-up date, and we rely on that stipulation here.

was 90% complete and the GFE fully integrated into the simulator. If CAE USA had known earlier that the A1U program was likely to be canceled, it would have ceased all efforts and stopped the build of the simulator, thus incurring only minimal costs, versus the full costs of the FFS." Exhibit 23 at 2. CAE further represented in its REA that the Coast Guard had "committed to maintain the GFE for a period of 5 years and authorized CAE to train other US government's customers in the A1U simulator on a non-interference basis." *Id.* at 1. By letter dated August 25, 2014, the Coast Guard contracting officer denied the REA, but indicated that, pursuant to the GFE property clause at FAR 52,245-1(d), CAE could submit a revised REA relating to the costs that CAE incurred for removal and packaging of the A1U equipment for its return to the Coast Guard. Exhibit 24 at 2.

29. On December 17, 2014, CAE submitted a certified claim to the contracting officer, seeking $8,432,339 as "CAE's total costs to build the flight simulator." Exhibit 25 at 12.

30. By decision dated April 17, 2015, the contracting officer denied CAE's claim. Exhibit 26; RSUF ¶ 24.

31. On June 5, 2015, the Board docketed CAE's June 1, 2015, appeal of the contracting officer's decision. The parties subsequently filed cross-motions for summary relief.

Discussion

I. Standard of Review

"Summary relief is appropriate when the moving party is entitled to judgment as a matter of law, based on the undisputed material facts." *MLJ Brookside, LLC v. General Services Administration*, CBCA 3041, 15-1 BCA ¶ 35,935, at 175,623. "A material fact is one that will affect the outcome of the case." *Turner Construction Co. v. Smithsonian Institution*, CBCA 2862, et al., 15-1 BCA ¶ 36,139, at 176,394.

In considering a request for summary relief, all reasonable inferences and presumptions are resolved in favor of the non-moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). "When both parties move for summary relief, each party's motion must be evaluated on its own merits and all reasonable inferences must be resolved against the party whose motion is under consideration." *Systems Management & Research Technologies Corp. v. Department of Energy*, CBCA 4068, slip op. at 11 (Apr. 6, 2016) (quoting *Government Marketing Group v. Department of Justice*, CBCA 964, 08-2 BCA ¶ 33,955, at 167,991). Nevertheless, "[o]nly disputes over facts that might affect the outcome

of the case under governing law will preclude the entry of summary [relief]." *Anderson*, 477 U.S. at 248. "The purpose of summary relief is not to deprive a litigant of a hearing, but to avoid an unnecessary hearing when only one outcome can ensue." *Fortis Networks, Inc. v. Department of the Interior*, CBCA 4176, 15-1 BCA ¶ 36,066, at 176,123 (citing *Vivid Technologies, Inc. v. American Science & Engineering, Inc.*, 200 F.3d 795, 806 (Fed. Cir. 1999)).

II. CAE's Contractual Language Argument

CAE argues that the contract, as written, required CAE to manufacture an FFS and imposed an obligation upon the Government not only to provide CAE with the A1U avionics to place into that FFS, but also to allow CAE to hold the A1U avionics for the length of the contract (both the base year and possible option years) for CAE's use in training third parties (from which CAE would earn income):

> Unlike the typical IDIQ services contract, the Contract required CAE to engage in a costly and time-consuming manufacturing-like effort to incorporate certain government-furnished electronics equipment ("avionics") particular to the A1U variant into a very complex device, a full motion flight simulator ("FFS"). Any contractor would have had to incur millions of dollars to develop the A1U simulator in preparation to perform in the event that the Coast Guard were to order the A1U training services. CAE determined that this would not be an economically viable arrangement if the Coast Guard was the only potential customer for training on the FFS with the government-furnished equipment ("GFE") A1U avionics. So, before submitting a proposal, CAE sought and received from the Coast Guard assurances that CAE could spread the costs of its investment by utilizing the finished A1U FFS, including the GFE avionics, to provide training services to other customers.
>
> But, just as CAE was nearing completion of the A1U FFS, the Coast Guard cancelled the program for which the training had been required – despite having encouraged CAE to continue investing heavily in the development of the simulator rather than warning it of the known likelihood of the cancellation – and then demanded the return of the GFE without allowing CAE to use it to recoup the costs of its investment by training other customers.

Appellant's Motion for Summary Relief at 1-2.

The problem with CAE's argument is that its description of what the contract says stretches the contract language far beyond what that language can reasonably support.

Nothing in the contract language or in the factual record provides the guarantee that CAE wants.

The contract here was an IDIQ contract, a contract type under which a contractor is to provide "[a]n indefinite quantity, within stated limits, of supplies or services during a fixed period" of time during which the Government will "place[] orders for individual requirements." 48 CFR 16.504(a). This type of contract "provide[s] the government purchasing flexibility for requirements that it cannot accurately anticipate." *Travel Centre v. Barram*, 236 F.3d 1316, 1318 (Fed. Cir. 2001). While an IDIQ contract "provides that the government will purchase an indefinite quantity of supplies or services from a contractor during a fixed period of time, it requires the government to order only a stated minimum quantity of supplies or services." *Id.* at 1319; *see Mason v. United States*, 615 F.2d 1343, 1349 (Ct. Cl. 1980) ("A guaranteed minimum purchase amount is . . . essential to there being an enforceable indefinite quantities contract."). Accordingly, "under an IDIQ contract, the government is required to purchase the minimum quantity stated in the contract, but when the government makes that purchase its legal obligation under the contract is satisfied." *Travel Centre*, 236 F.3d at 1319.

CAE's contract provided a minimum purchase guarantee of $25,000 of HC-130H and/or A1U training services. That is, the contract only guaranteed the purchase of $25,000 of any of the training services identified in the contract. So long as the Coast Guard ordered at least $25,000 of HC-130H training services, which it did, the contract did not require the Coast Guard to purchase any A1U training services. In fact, CAE does not dispute that the Coast Guard's purchase of more than $25,000 of HC-130H services satisfied the purchase requirements of the contract.

Nevertheless, CAE argues that the contract was not only an IDIQ contract, but also covered CAE's development of a new FFS (into which CAE would install the Coast Guard's A1U avionics GFE). The contract does not say that. Instead, the plain language of the contract indicates that the Coast Guard was acquiring training services through this contract, and nothing more:

> The Contractor is to provide a series of courses for US Coast Guard personnel; HC-130H/A1U aircrew training, and HC-130H/J & HC-144 Loadmaster training . . . .
>
> The courses will incorporate classroom, computer-based training (CBT) aids and full motion simulator practical training in the appropriate Coast Guard cockpit and flight deck configuration(s) (HC-130H/J/A1U or HC-144A). The contractor shall be required to provide training facilities; appropriate flight

> training devices configured to emulate [Coast Guard] aircraft, and qualified instructors with the appropriate technical knowledge and instructional experience. Services will include instructor-led training, curriculum development and performance analysis.

Exhibit 7 at 1-2. The only items that were priced out in this IDIQ contract were training services, and every item that the Coast Guard ordered through task orders under this IDIQ contract was training. *See id.* at 3-40. Under the Payments clause incorporated by reference into this contract, *see* Exhibit 7, Attachment 1 at 42 (incorporating FAR 52.232-1), the Coast Guard was to pay, "upon the submission of proper invoices or vouchers, the prices stipulated in this contract for . . . services rendered and accepted, less any deductions provided in this contract." FAR 52.232-1. There is no line item covering the development, or providing for payment, of a new FFS.

In fact, the contract required the *contractor* to provide the necessary FFS as part of the contract, without reference to how CAE elected to acquire it. *See* Exhibit 7, Attachment 1 at 8 ¶ 4.0. Although CAE's proposal indicated that CAE, on its own initiative, had decided to build a new FFS for the A1U training, *see* Exhibit 6 at 11, that disclosure does not somehow shift to the Government the financial responsibility for the cost of the FFS. To make CAE's representation about manufacturing a new FFS a part of the contract, the contract would have to "use language that leaves no . . . 'reasonable doubt about the fact that the [technical proposal]," or at least the FFS manufacturing requirement, "is being incorporated into the contract.'" *IBM Corp. v. United States*, 119 Fed. Cl. 145, 154 (2014) (quoting *Lakeshore Engineering Services, Inc. v. United States*, 748 F.3d 1341, 1347 (Fed. Cir. 2014) (quoting *Northrop Grumman Information Technology, Inc. v. United States*, 535 F.3d 1339, 1344 (Fed. Cir. 2008))). The contract here does not reference the technical proposal, much less purport to incorporate some or all of it into the actual contract. Accordingly, the contract itself did not require CAE to build a new FFS.

Further, CAE's assertion that it "sought and received from the Coast Guard assurances that CAE could spread the costs of its investment by utilizing the finished A1U FFS, including the GFE avionics, to provide training services to other customers" over the course of the contract's five-year life, Appellant's Motion for Summary Relief at 2, has no support in the factual record. CAE does not allege reliance on any verbal representations by Coast Guard representatives, but instead cites only to a question that it submitted during the procurement process about whether it could use the FFS with the A1U GFE in it "to train other customers," to which the Coast Guard responded by stating that, "[o]perationally, the GFE can be used to train other customers on a 'not to interfere' basis." Exhibit 4 at 1. That statement is a far cry from a representation that CAE could "spread the costs of its

investment" over a five-year period by selling training services to entities other than the Coast Guard, for the following reasons:

First, the contract here was for one base year, with four one-year options. CAE had no contractual right to assume that the Coast Guard would exercise all four options. CAE certainly could not compel the Coast Guard to do so if the Coast Guard elected not to. *See Government Systems Advisors, Inc. v. United States*, 847 F.2d 811, 813 (Fed. Cir. 1988) (if a contract is renewable "at the option of the Government," the Government is under no obligation to exercise the option); *Jones Automation, Inc. v. United States*, 92 Fed. Cl. 368, 372 (2010) (contractor cannot compel the Government to exercise option). CAE could not assume that it had a five-year contract, and the Coast Guard made no representation that it did.

Second, the contract made clear that the Coast Guard did not have to provide CAE with the A1U GFE unless, and until twelve months before, it ordered A1U training services. Exhibit 3, Attachment 1 at 7-8, 12, 13, 15, 18-20; Exhibit 7, Attachment 1 at 7, 12,13, 15, 18-20. If the Coast Guard did not order A1U training services until the last option year, the Coast Guard would not have to deliver the A1U GFE until the fourth year of the contract – twelve months before A1U training services would begin. There is no language in this contract requiring the Coast Guard to deliver the A1U GFE at the outset of the contract or at any specific subsequent time, other than through the twelve-months-prior-to-A1U-training language. Accordingly, for CAE to believe that it had some contractual right to use the A1U GFE for the full life of the contract would be unreasonable, even if it hoped that such use might happen. In fact, the Coast Guard did not deliver the A1U avionics until November 2013, almost a year-and-a-half into the contract performance period, and CAE never complained during that time that the delivery was late or somehow constituted a breach of contract.

Third, and most importantly, the contract, as previously discussed, is an IDIQ contract covering not only A1U training services, but other training services as well. The $25,000 minimum value written into the contract guaranteed that the Coast Guard would order at least $25,000 of the identified training services, but the Coast Guard could (and did) fulfill that guarantee by ordering services *other* than A1U training services. The contract did not guarantee that the Coast Guard would *ever* order the A1U services. As a result, from the outset of this contract, because CAE had no guarantee that the Coast Guard would ever order A1U training services, CAE had no guarantee that the Coast Guard would ever be obligated to provide it with the A1U GFE. If the Coast Guard never had an obligation to provide CAE with the A1U GFE in the first place, CAE has no basis for complaining that, once the Coast Guard delivered the A1U GFE, the Coast Guard was contractually barred from seeking its return once it determined that it was not going to order any A1U training services.

In light of the nature of this IDIQ contract and its other provisions, we cannot interpret the language of the Q&A – that the FFS "using the [A1U] GFE [could] be used to train other customers" on "a 'not to interfere' basis" – as guaranteeing that CAE would be able to hold, and use, the A1U GFE for a full five-year period. The Q&A is more reasonably read here as permitting CAE to use the A1U GFE for whatever period it might have the GFE in its possession. Had CAE truly wanted a five-year guarantee (with a requirement that the A1U GFE be provided at the outset of the contract performance period and that CAE be allowed to retain for a full five-year period, even if options were not exercised), it could have demanded that guarantee and, before executing the contract, negotiated a clear and unambiguous contractual provision to that effect or, at the very least, requested an answer through a Q&A that more clearly and directly addressed CAE's true intention. *See DG21, LLC v. Mabus*, No. 2015-1830, 2016 WL 2860725, at *4 (Fed. Cir. May 6, 2016) ("If [the contractor] wanted to protect itself . . . , it could have bargained for such protections."). CAE did not do so. Instead, it is attempting to rely on a vague representation that does not clearly state when or for how long CAE would hold the A1U GFE as creating an absolute right of access to the A1U GFE for the full life of the contract. Neither the language of the contract, the contract type, nor the history of the contract's development support CAE's position. "Having failed to protect itself during contract negotiation, . . . [the contractor] 'cannot now rewrite the clauses to provide it protections the government did not agree to.'" *DG21*, 2016 WL 2860725, at *4 (quoting *Lakeshore Engineering*, 748 F.3d at 1348).

III. CAE's Implied Duty Breach Claim

A. Defining The Duty of Good Faith and Fair Dealing

"Implied in every contract is a duty of good faith and fair dealing that requires a party to refrain from interfering with another party's performance or from acting to destroy another party's reasonable expectations regarding the fruits of the contract." *Bell/Heery v. United States*, 739 F.3d 1324, 1334-35 (Fed. Cir. 2014). "The covenant . . . requires a party to respect and implement the contract in accordance with its terms." *First Nationwide Bank v. United States*, 431 F.3d 1342, 1350 (Fed. Cir. 2005). IDIQ contracts are not exempt from this implied duty. *E&E Enterprises Global, Inc. v. United States*, 120 Fed. Cl. 165, 182 (2015); *see ALK Services, Inc. v. Department of Veterans Affairs*, CBCA 1789, 10-2 BCA ¶ 34,518, at 170,246 ("every contract includes the implied obligation that the parties will act in good faith during performance and that, while an IDIQ contract may only obligate the Government to order a specified amount of services, the contractor nonetheless is entitled to rely on other contract provisions implying that it will be fairly considered for additional work, if required by the Government").

Although the existence of the implied duty of good faith and fair dealing is widely acknowledged, exactly what that duty entails has proven more difficult to define. At least one commentator has noted that "[g]ood faith is an intangible and abstract quality with no technical meaning or statutory definition." Edward J. Imwinkelried, *The Implied Obligation of Good Faith in Contract Law: Is It Time to Write Its Obituary?*, 42 Tex. Tech. L. Rev. 1, 1 (2009) (quoting Black's Law Dictionary 693 (6th ed. 1990)); *see Market Street Associates Ltd. Partnership v. Frey*, 941 F.2d 588, 593 (7th Cir. 1991) ("cases are cryptic as to its meaning though emphatic about its existence"). Further, the duty is not truly a single concept capable of a concise definition, but a duty that encompasses numerous concepts. One of the first and foremost commentators on the implied duty of good faith was Professor Robert Summers, who, in 1968, identified six types of violations of good faith duties that had been found to occur during contract performance: evading the spirit of the deal; wilfully rendering imperfect or merely "substantial" performance; abusing powers to determine contractual compliance; interfering with the other party's contract performance; and failing to cooperate in the other party's performance. B.J. Reitier, *Good Faith in Contract*, 17 Val. U. L. Rev. 705, 710 (1983) (citing Robert S. Summers, *"Good Faith" in General Contract Law and the Sales Provisions of the Uniform Commercial Code*, 54 Va. L. Rev. 195, 234-42 (1968) [Summers I]). Some or all of these varying types of violations – some which involve inappropriate affirmative conduct by a contracting party, and some of which involve an inappropriate *failure* to act – have been accepted as actionable by the United States Court of Appeals for the Federal Circuit, the Court of Federal Claims, and/or the boards of contract appeal. *See, e.g.*, *Precision Pine & Timber, Inc. v. United States*, 596 F.3d 817, 829 (Fed. Cir. 2010) (affirmative bait-and-switch action "specifically designed to reappropriate the benefits the other party expected to obtain from the transaction, thereby abrogating [that party's] obligations under the contract"); *Lewis-Nicholson, Inc. v. United States*, 550 F.2d 26, 32 (Ct. Cl. 1977) (interference that hinders the other's performance); *Kehm Corp. v. United States*, 93 F. Supp. 620, 623 (Ct. Cl. 1950) (failing to take actions necessary to enable the other party to perform); *Barseback Kraft AB v. United States*, 36 Fed. Cl. 691, 705-06 (1996) (party who is vested with discretion under the contract must exercise that discretion reasonably), *aff'd*, 121 F.3d 1475 (Fed. Cir. 1997); *Celeron Gathering Corp. v. United States*, 34 Fed. Cl. 745, 753 (1996) (affirmative duty of cooperation); *South Atlantic Gas Co.*, GSBCA 359, 1959 WL 11548 (Jan. 9, 1959) (intentional departure or wilful default in performance of a substantial requirement of contract).

The ultimate goal underlying all of these concepts is to ensure the availability of "a 'safety valve' to which judges may turn to fill gaps and qualify or limit rights and duties otherwise arising under rules of law and specific contract language." Robert S. Summers, *The General Duty of Good Faith – Its Recognition and Conceptualization*, 67 Cornell L. Rev. 810, 811 (1981) [Summers II]. Nevertheless, the numerosity of both affirmative and negative concepts that comprise the implied good faith duty make it virtually impossible to

develop a specific and singular test for evaluating whether a particular action (or inaction) violates that duty. In fact, commentators have argued that any attempt to define the term "good faith" under contract law through an affirmative all-encompassing definition would result in something so broad and amorphous that it could potentially encompass almost any action that one party (or a judge) might not like and would provide no means by which contracting parties, at the outset of their contractual relationship, could reliably understand their true rights and obligations. *See, e.g.*, Russell A. Eisenberg, *Good Faith Under the Uniform Commercial Code – A New Look at an Old Problem*, 54 Marq. L. Rev. 1, 7 (1971) (if good faith is "simply what a judge says it is," each judge could "determine what his own personal standards are and apply them to the case at hand, even if the litigants themselves have different standards which they both agree upon"); Imwinkelried, *supra*, at 5 (discussing view that "purported reliance on a general, invariant meaning [of good faith] would lead to vacuous opinions and unpredictability").

Yet, "[i]f the potential of the good faith requirement is to be realized in practice, judges . . . must give meaning to the phrase and must impose *specific* duties of good faith." Summers I, *supra*, at 199 (emphasis added). Professor Summers proposed that, to achieve that definitional goal in contract law, the good faith duty should be defined by reference to what it excludes:

> Summers recommended a very different way of conceptualizing good faith – as an excluder. He proposed deriving a meaning of good faith from its opposites. He argued that rather than considering the broad, loose language in each opinion, students of the good faith opinions should carefully examine the specific conduct the judge rules out. Summers maintained that it was more useful to identify the particular forms of bad faith the courts had prohibited. Thus, the meaning of good faith could be defined by way of contrast to the various types of bad faith the courts had condemned. In his view, however, the concept of good faith is too "circumstance bound" to permit any further generalization.

Imwinkelried, *supra*, at 5-6; *see* Summers II, *supra*, at 818 (good faith duty "was not appropriately formulable in terms of some general positive meaning – through the specification of a set of necessary and sufficient conditions, for example; rather, it functioned as an excluder to rule out a wide range of heterogeneous forms of bad faith"). We will apply that rationale in evaluating CAE's implied duty breach claim.

Beyond the lack of a precise definition for evaluating the overarching good faith duty, there is a modern division of judicial sentiment over the *basis* of the contractual duty. "A distinct minority of jurisdictions take the position that the obligation creates a separate

contract duty and that its breach will support an independent cause of action," meaning that "the alleged breach need not violate any express duty in the contract." Imwinkelried, *supra*, at 9. Conversely, the majority of jurisdictions "treat the obligation in a far more restrictive fashion," holding that, "if the express terms" of a contract "authorize the [party's] conduct, the implied obligation cannot be invoked to convert that conduct into a breach." *Id.* at 9-10. In those jurisdictions, "[t]he implied obligation is derivative in nature and arises from the express substantive duties" of the contract, and it "cannot be invoked to add or create rights beyond those expressly conferred by the contract's terms." *Id.* at 11.

It is the majority approach that the Court of Appeals for the Federal Circuit, whose precedential decisions are binding upon us, has adopted. As the Court recognized in *Metcalf Construction Co. v. United States*, 742 F.3d 984 (Fed. Cir. 2014), "what [the duty of good faith and fair dealing] entails depends in part on what that contract promises (or disclaims)." *Id.* at 991 (quoting *Precision Pine*, 596 F.3d at 828). The Court held that, "while the implied duty exists because it is rarely possible to anticipate in contract language every possible action or omission by a party that undermines the bargain, the nature of that bargain is central to keeping the duty focused on 'honoring the reasonable expectations created by the autonomous expressions of the contracting parties.'" *Id.* (quoting *Tymshare, Inc. v. Covell*, 727 F.2d 1145, 1152 (D.C. Cir. 1984) (per Scalia, J.)). Accordingly, "the 'implied duty of good faith and fair dealing cannot expand a party's contractual duties beyond those in the express contract or create duties inconsistent with the contract's provisions.'" *Id.* (quoting *Precision Pine*, 596 F.3d at 831). "[A]n act will not be found to violate the duty . . . if such a finding would be at odds with the terms of the original bargain, whether by altering the contract's discernible allocation of risks and benefits or by conflicting with a contract provision." *Id.*

B. The Absence of Bad Faith

In its motion for summary relief, the Coast Guard labels CAE's argument a "Bad Faith Theory" and argues that the record contains no evidence of any bad faith by the Government towards CAE. Certainly, bad faith conduct will constitute a violation of the implied duty of good faith and fair dealing if it affects the contractor's reasonable contract expectations. *Brock v. United States*, No. 11-176C, 2012 WL 2057036, at *10 (Fed. Cl. June 7, 2012). To prove bad faith by the Government, a contractor must establish, by clear and convincing evidence, that a government official acted with "some specific intent to injure the [contractor]." *Am-Pro Protective Agency, Inc. v. United States*, 281 F.3d 1234, 1240 (Fed. Cir. 2002) (quoting *Kalvar Corp. v. United States*, 543 F.2d 1298, 1302 (Ct. Cl. 1976)). CAE has not alleged any such intent.

Yet, "[t]o show a violation of the duty of good faith and fair dealing, a party need not prove that the other party to a contract acted in bad faith." *Kiewit-Turner v. Department of Veterans Affairs*, CBCA 3450, 15-1 BCA ¶ 35,820, at 175,176 (2014); *see TigerSwan, Inc. v. United States*, 110 Fed. Cl. 336, 346 (2013) ("proof of 'bad faith' is not required to show a breach of the implied duty of good faith and fair dealing"). To the contrary, "[p]arties can show a breach of the implied duty of good faith and fair dealing by proving lack of diligence, negligence, or a failure to cooperate," meaning that "[e]vidence of government intent to harm the contractor is not ordinarily required." *TigerSwan*, 110 Fed. Cl. at 345-46. The absence of any "bad faith" allegation by CAE is not fatal to its implied duty of good faith and fair dealing claim.

C. CAE's Allegations of an Implied Duty Breach

CAE has alleged two different breaches of the implied duty. First, it claims that the Coast Guard breached the duty by failing to allow CAE to hold the A1U avionics package (so that it could use it to make money providing A1U training services to third parties) for the entire five-year anticipated duration of this contract. Second, it claims that the Coast Guard breached the duty by failing to warn CAE that the Coast Guard was considering terminating the A1U program while, at the same time, the Coast Guard knew that CAE was manufacturing a FFS specifically for use in providing A1U training services to the Government and to third parties.

1. Failure to Lend A1U GFE Until End of Contract

With regard to its first claim of an implied duty breach – that the Coast Guard should have allowed it to hold and use the A1U avionics for the life of its IDIQ contract – that claim appears to be tied to the theory that the Coast Guard failed to satisfy its duties to cooperate and not to hinder the other party's contract performance. "In any case where the plaintiff's performance requires the cooperation of the defendant, . . . the defendant, by necessary implication, promises to give this cooperation and if he fails to do so he is immediately liable though his only express promise is to pay money at a future day." *George A. Fuller Co. v. United States*, 69 F. Supp. 409, 411 (Ct. Cl. 1947) (quoting Williston on Contracts § 1318). Nevertheless, "any breach of [the good faith] duty has to be connected, though it is not limited, to the bargain struck in the contract." *Metcalf Construction*, 742 F.3d at 994. "What is promised or disclaimed in a contract helps define what constitutes 'lack of diligence and interference with or failure to cooperate in the other party's performance.'" *Id.* at 991 (quoting *Malone v. United States*, 849 F.2d 1441, 1445 (Fed. Cir. 1988)).

Here, as previously discussed, the contract does not require the Coast Guard to provide CAE with A1U avionics unless, and until twelve months before, it is going to order

A1U training services, and the contract does not require the Coast Guard *ever* to order such services if, as here, it has satisfied its minimum order obligations through the ordering of HC-130H training services. Accordingly, what CAE is seeking here is something beyond what the contract requires. That is not the purpose of the implied duty of good faith and fair dealing. "[T]his implied covenant guarantees that the government will not *eliminate* or *rescind* contractual benefits through action that is specifically designed to reappropriate the benefits and thereby abrogate the government's obligations under the contract." *Bell/Heery*, 739 F.3d at 1335 (emphasis added). It is not designed to give the contractor additional rights beyond, or greater rights than, those that the contract provides.

Would it have been nice of the Coast Guard to let CAE hold the A1U avionics for a longer period of time? Certainly.[2] But the good faith and fair dealing duty "is not limitless." *West Run Student Housing Associates, LLC v. Huntington National Bank*, 712 F.3d 165, 170 (3d Cir. 2013). It does not entitle contractors to extra-contractual benefits, or require the Government to take extra-contractual steps, simply because such generosity would be nice, even if gratuitous. *See Excel Services, Inc.*, ASBCA 30565, 85-3 BCA ¶ 18,369, at 92,159 (duty to cooperate "does not obligate the Government to assist a contractor" outside the requirements of the contract "by taking positive actions" that the contract does not require). If the Government is not *contractually* obligated to do certain things, it is not financially liable – under a breach of contract theory – for failing to do them. Unless CAE's right to retain the A1U GFE for the full life of this contract was "a bargained-for benefit of" the contract, that right was not "a 'fruit' of" the contract, and the "obligation of the government" to grant that right could not "be abrogated when no such obligation existed." *Westlands Water District v. United States*, 109 Fed. Cl. 177, 205 (2013). Based upon the language of this contract, CAE had no contractual right to hold the A1U GFE for the life of the contract, and it has not identified any basis for seeking damages for the Coast Guard's failure to allow CAE to hold the A1U avionics package for a longer period of time than it did.

2. Failure to Disclose Likely A1U Program Termination

In its second claim of an implied duty breach, CAE argues that the Coast Guard did not discourage it from continuing to prepare to provide A1U training services (and to build its new FFS) after the Coast Guard knew that it was likely that it would cancel the A1U program. Although CAE concedes that the Coast Guard did not actually decide to cancel the A1U program until March 2014, it has cited to evidence showing that, by July 2013, the

[2] The Coast Guard indicates that it requested the return of the A1U avionics based upon another agency's need. The reason for the recall, however, is not relevant here.

Coast Guard knew that it was likely to cancel the program and that, at the same time, it knew that CAE was continuing to develop the new FFS.

"In government contracts law, under certain circumstances the government owes a duty to disclose critical information to a contractor that is necessary to prevent the contractor from unknowingly pursuing 'a ruinous course of action.'" *McDonnell Douglas Corp. v. United States*, 182 F.3d 1319, 1329 (Fed. Cir. 1999) (quoting *Helene Curtis Industries, Inc. v. United States*, 312 F.2d 774, 778 (Ct. Cl. 1963)). "Although it is not a fiduciary toward its contractors, the Government – where the balance of knowledge is so clearly on its side – can no more betray a contractor into a ruinous course of action by silence than by the written or spoken word." *Helene Curtis*, 312 F.2d at 778. "Failure to disclose such critical information may result in a finding that the government breached its contractual duty." *McDonnell Douglas Corp. v. United States*, 323 F.3d 1006, 1020 (Fed. Cir. 2003). This doctrine, known as the "superior knowledge" doctrine, *GAF Corp. v. United States*, 932 F.2d 947, 949 (Fed. Cir. 1991), "is consistent with the general contract law principles of good faith and fair dealing. *Northrop Grumman Corp., Military Aircraft Division v. United States*, 63 Fed. Cl. 12, 15 (2004).

Historically, the superior knowledge doctrine has been applied to the Government's failure to disclose information during the pre-award process. *See, e.g.*, *American Ship Building Co.*, 654 F.2d 75, 79 (Ct. Cl. 1981); *Helene Curtis*, 312 F.2d at 777; *Hardeman-Monier-Hutcherson v. United States*, 458 F.2d 1364, 1371 (Ct. Cl. 1972).[3] Here, though, CAE alleges that the Government, *after* contract award and *during* contract performance, acquired information that it then failed to disclose: namely, that the Government was considering terminating the A1U program while, at the same time, it failed to discourage

[3] In the past, several tribunals had held that such a failure to disclose pre-award superior knowledge is a breach of the implied duty of good faith and fair dealing. *See, e.g.*, *Florida Engineered Construction Products Corp. v. United States*, 41 Fed. Cl. 534, 542 (1998), *appeal dismissed*, 185 F.3d 880 (Fed. Cir. 1999); *Miller Elevator Co. v. United States*, 30 Fed. Cl. 662, 674, *appeal dismissed*, 36 F.3d 1111 (Fed. Cir. 1994); *Odebrecht Contractors of California, Inc.*, ENG BCA 6372, 00-2 BCA ¶ 30,999, at 153,071. But the Federal Circuit has more recently held that the duty of good faith and fair dealing does "not exist until the contract [is] signed" and "'does not deal with good faith in the formation of a contract.'" *Scott Timber Co. v. United States*, 692 F.3d 1365, 1372 (Fed. Cir. 2012) (quoting *Restatement (Second) of Contracts* § 205 cmt. c (1981)). Accordingly, as applied to pre-award failures to disclose vital information, the implied duty to disclose superior knowledge is something separate and distinct from the implied duty of good faith and fair dealing, even if they involve similar principles. *See Northrop Grumman*, 63 Fed. Cl. at 15.

CAE from continuing to prepare to provide A1U training. CAE asserts that it would not have spent money to build the new FFS if the Coast Guard had been more forthright about its future A1U program plans and if the contracting officer had conducted a more rigorous investigation to learn what higher-level agency plans were for the A1U program. It is far from clear whether the superior knowledge doctrine applies to information that the Government acquires after award. *Compare* Louis D. Victorino, E. Richard Southern, & Julia A. Soyars-Berman, *Government Failure to Disclose*, 92-10 Briefing Papers 1, 2 (Sept. 1992) ("a failure to disclose can, at least theoretically, relate to information gained by the Government *after contract award*" (emphasis in original)), *with* Ralph C. Nash, *Nondisclosure of Superior Knowledge: The Scope of the Government's Duty*, 20 Nash & Cibinic Report ¶ 1 (Jan. 2006) ("the 'duty' to disclose 'superior knowledge' has nothing to do with contract administration or contract disputes – it is an obligation that arises *before* a contract is entered into, in the contract formation process" (emphasis in original)). We need not resolve this conflict between the commentators because, if we were to apply the doctrine to post-award information, CAE could not prevail.

The superior knowledge doctrine only applies "in limited circumstances." *GAF Corp.*, 932 F.2d at 949. To show a contract breach under the superior knowledge doctrine, a contractor claiming a breach by non-disclosure must establish the following:

> The doctrine of superior knowledge is generally applied to situations where: (1) a contractor undertook to perform without vital knowledge of a fact that affects performance costs or duration; (2) the government was aware the contractor had no knowledge of and had no reason to obtain such information; (3) any contract specification supplied misled the contractor or did not put it on notice to inquire; and (4) the government failed to provide the relevant information.

Giesler v. United States, 232 F.3d 864, 876 (Fed. Cir. 2000).

CAE cannot satisfy the second prong of that test, as it failed to identify any information that the Coast Guard possessed about A1U program plans of which CAE was not made aware. CAE does not challenge the Coast Guard's factual representation that the decision to cancel the A1U program was not made until March 19, 2014, and that, within five days, the Coast Guard told CAE of that decision. *See* RSUF ¶¶ 17-18. CAE's complaint is that it should have been informed of the possibility of that decision much earlier. It asserts that, by July 2013, "the Government knew of the likelihood that the A1U training services would not be ordered or failed to reasonably inquire into the A1U program's status long before the program was actually cancelled." Appellant's Motion for Summary Relief at 16. It is this information – about the possibility of the program's cancellation – that CAE

allegedly did not have. Yet, CAE repeatedly cites to record evidence establishing that, in July 2013, CAE was well aware that the Government was considering cancelling the A1U program. It cites to a July 3, 2013, email message that it received referring to a "'new direction from the USCG in regards to the C130H program' that involved stopping all but a few efforts on the A1U program." ASUF ¶ 23(d) (quoting Exhibit 39 at 3). It cites to another July 3, 2013, email message titled "A1U Cancellation" in which a Coast Guard contract specialist informed CAE that the Coast Guard was cancelling a solicitation for A1U maintenance training and that he did not know "if it will be solicited again." Exhibit 40 at 1; *see* ASUF ¶ 23(c). It cites to the cancellation on July 1, 2013, of all further regular weekly meetings of the "A1U Team" at which interested parties had been discussing the A1U development. ASUF ¶ 22. A viable superior knowledge claim requires that the contractor "undertook to perform without vital knowledge of a fact that affects performance costs or duration." *Giesler*, 232 F.3d at 876. CAE plainly knew in July 2013 that the Government was considering what to do with the A1U program and that it might be canceled, which precludes a superior knowledge complaint.

CAE asserts that the information it received in the July 2013 email messages about possible A1U program cancellation was incomplete and insufficient because "CAE did not and could not know exactly what the emails portended for the A1U program" and represented "only vaguely troubling and confusing developments." Appellant's Reply at 6. Yet, it is clear that the actual decision not to proceed with the A1U program was not made until March 2014. CAE has identified no information that the Government withheld from it about the Coast Guard's internal deliberations that would have assisted it in deciding whether to delay manufacturing its FFS. "A mere governmental failure to disclose each and every bit of information it has clearly is not, in and of itself, enough to serve as a basis for contractor recovery." *Piasecki Aircraft Corp. v. United States*, 667 F.2d 50, 59 (Ct. Cl. 1981). CAE plainly had the "vital" and "essential" information: that the Coast Guard was contemplating cancelling the A1U program. That is the only information that the superior knowledge doctrine requires be disclosed. *See ECOS Management Criteria, Inc.*, VABCA 2058, 86-2 BCA ¶ 18,885, at 95,260 (a necessary element of superior knowledge claim is that "the 'special' knowledge withheld was 'vital to the successful completion of the contract'" (quoting *Piasecki Aircraft*, 667 F.2d at 59 (quoting *H.N. Bailey & Associates v. United States*, 449 F.2d 376, 382-83 (Ct. Cl. 1971))).

CAE also complains that it could not have had "equal knowledge" to the Government, apparently because CAE was not privy to the Government's internal deliberations, Appellant's Reply at 7, but the superior knowledge doctrine does not require that. It only requires, in appropriate circumstances, the disclosure of *vital* or *essential* information of which the contractor is unaware. *Bannum, Inc. v. United States*, 80 Fed. Cl. 239, 246 (2008).

CAE was aware that the Government was contemplating canceling the A1U program. That was the essential information that it needed for decision-making purposes.

CAE's real complaint seems to be that the Government did not decide to cancel the A1U program earlier than it did. Had the Government done so, CAE asserts, CAE would not have manufactured the new FFS. Yet, we can find nothing in the implied duty doctrine that would compel the Coast Guard to decide to cancel the A1U program at an earlier date. *See SupplyCore, Inc.*, ASBCA 58676, 16-1 BCA ¶ 36,262, at 176,907 (Government did not violate implied duty of good faith and fair dealing by failing "to provide *earlier* notice that the fourth option year would not be exercised" (emphasis in original)). Certainly, CAE has not made any allegations that the Coast Guard intentionally delayed that decision or acted in bad faith in reaching the decision.

Further, given that CAE elected to proceed with its FFS manufacturing efforts after learning that the Government might cancel the A1U program, CAE has no basis for complaint. CAE did not have to begin A1U training services for the Government until twelve months after receiving the A1U GFE, which it did not receive until November 2013 (five months after it became aware that the Government was considering cancelling the A1U program). Yet, after learning that the A1U program was being reconsidered, and beginning before it had received the A1U GFE (and before the twelve-month clock had started running), CAE chose to incur more than $5 million in costs to develop the new FFS anyway, presumably because CAE wanted to be ready to earn money providing A1U training services to third parties as soon as it received the A1U GFE. That was a business decision that CAE was entitled to make, but, because the contract did not cover (even if it did not preclude) the provision of third-party training services, that decision does not become compensable simply because the Government took longer than CAE would have liked before deciding to cancel the A1U program. CAE has not identified an actionable failure to disclose superior knowledge or any viable implied duty theory.

CAE also complains that the contracting officer, who (as CAE seems to acknowledge) honestly did not know what would happen with the program, failed to try hard enough (beginning in July 2013) to gather more information about the likelihood of A1U program termination and report it to CAE. That appears to refer to an alleged breach of the duty to cooperate – that is, the Coast Guard "fail[ed] to help in the solution of a problem that has arisen during contract performance." John Cibinic, Jr., Ralph Nash, & James F. Nagle, *Administration of Government Contracts* 302-03 (4th ed. 2006). But CAE does not identify what information the contracting officer would have found had he done so. CAE does not allege that the actual decision to terminate the A1U program was made any earlier than March 2014, and it does not explain how a day-by-day analysis of the current thinking of particular government representatives would have assisted it in deciding how to proceed.

Further, both CAE and the Coast Guard were equally aware that, in December 2013, Congress, through the National Defense Authorization Act for Fiscal Year 2014, effected substantial changes to the Coast Guard's fleet of aircraft, requiring the Coast Guard to transfer seven of its HC-130H aircraft to the United States Forest Service. Exhibit 10 at 23; RSUF ¶ 15; *see Federal Crop Insurance Corp. v. Merrill*, 332 U.S. 380, 384 (1947) (persons are charged with knowledge of the law). Given CAE also knew that the Government was contemplating A1U program cancellation, CAE has identified no vital information that the Government possessed between July 2013 and March 2014 that was different from what CAE itself knew.[4]

CAE has also not identified any "sharp dealing" or affirmative misconduct by the contracting officer. At least one court has held that, if a contracting party tries to "take deliberate advantage of an oversight" or a lack of knowledge "by [a] contract partner concerning his rights under the contract," that intentional conduct can be viewed as "sharp dealing" that may violate the implied duty. *Market Street Associates*, 941 F.2d at 594. But, here, there is no allegation that the contracting officer was making false misrepresentations to the contractor: he indicated that he did not know what the future A1U program status would be, but that, until he received different information, he had a contract with CAE through which, at some point, CAE might be called upon to provide A1U training services. That statement, when it was made, was true. There was no "sharp dealing" on the record before us and, therefore, no implied duty breach on that basis.

Having excluded the various concepts discussed above as viable bases for a breach claim here, we find that CAE has failed to allege and support, for purposes of summary relief, that the Coast Guard breached its implied duty of good faith and fair dealing.

D. Constructive Termination

CAE appears to argue that the Coast Guard's decision in March 2014 not to order any A1U training services could be viewed as a constructive termination for convenience, which would entitle it to termination settlement expenses (including the lost costs of developing its FFS).[5] *See* Appellant's Cross-Motion for Summary Relief at 17. Yet, under an IDIQ

[4] CAE suggests that the Coast Guard contracting officer should have contacted other agencies to obtain information about their plans for the A1U program, but CAE does not identify what information, beyond continued uncertainty about whether the program would continue, the contracting officer would have obtained from other agencies.

[5] The Coast Guard asserts that CAE is also seeking anticipatory profits through its constructive termination argument and asks us to deny that request. CAE has disclaimed that

contract, after the government purchases the minimum quantity stated in the contract, "its legal obligation under the contract is satisfied." *Travel Centre v. Barram*, 236 F.3d 1316, 1319 (Fed. Cir. 2001). 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. *International Data Products Corp. v. United States*, 492 F.3d 1317, 1324 (Fed. Cir. 2007). Similarly, if the Government determines that it is not going to order any additional supplies or services under a particular IDIQ contract, the Government does not breach its contract obligations, assuming it has met its minimum ordering obligation, by allowing the IDIQ contract to lapse according to its terms rather than terminating it early. *J. Cooper & Associates, Inc. v. United States*, 53 Fed. Cl. 8, 21 (2002), *aff'd*, 65 F. App'x 731 (Fed. Cir. 2003). CAE cannot recover damages under a constructive termination for convenience theory where, as here, the Coast Guard had already satisfied its minimum ordering obligations before recognizing that it would not order any A1U training services.

Decision

For the foregoing reasons, we grant the Coast Guard's motion for summary relief and deny CAE's cross-motion for summary relief. Accordingly, CAE's appeal is **DENIED**.

HAROLD D. LESTER, JR.
Board Judge

We concur:

STEPHEN M. DANIELS
Board Judge

RICHARD C. WALTERS
Board Judge

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it is seeking anticipatory profits. *See* Appellant's Motion for Summary Relief at 17-18. Accordingly, we need not address the Coast Guard's argument.