UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

DENIED: September 29, 2017

CBCA 5299

SYLVAN B. ORR,

Appellant,

v.

DEPARTMENT OF AGRICULTURE,

Respondent.

Sylvan B. Orr, pro se, Salmon, ID.

Daniel B. Rosenbluth, Office of the General Counsel, Department of Agriculture, Golden, CO, counsel for Respondent.

Before Board Judges **GOODMAN**, **SULLIVAN**,[1] and **LESTER**.

LESTER, Board Judge.

In this appeal of a contracting officer's decision under the Contract Disputes Act (CDA), 41 U.S.C. §§ 7101-7109 (2012), appellant, Sylvan B. Orr, seeks monetary compensation under an incident blanket purchase agreement (I-BPA) with the United States

[1] Judge Richard C. Walters, who was a part of the panel that issued an earlier decision in this appeal, retired from federal service in January 2017. Judge Marian E. Sullivan was selected by random assignment to replace him as a panel member.

Forest Service (USFS) (an entity within the Department of Agriculture, the respondent in this appeal) and a task order issued pursuant to the I-BPA for weed washing units for use in the E-60 Bobcat fire. By decision dated October 18, 2016, the Board dismissed most of Mr. Orr's appeal, but found that Mr. Orr could pursue that portion of his claim seeking compensation for delays in solid waste disposal allegedly arising from actions under the Bobcat fire resource order that post-dated an executed release of claims. *Sylvan B. Orr v. Department of Agriculture*, CBCA 5299, 16-1 BCA ¶ 36,522, at 177,931. In allowing Mr. Orr to preserve that portion of his damages claim, we held that, "[t]o the extent that Mr. Orr's solid waste disposal claim is based upon a Forest Service employee's alleged actions, or inactions, *after* execution of the release, the release, at least based upon the information currently in the record, does not bar that claim." *Id.* at 177,928 (emphasis in original).

The parties have now supplemented the record, providing additional factual information to the Board, and submitted the remaining portion of Mr. Orr's claim for a decision on the record pursuant to Rule 19 of the Board's rules. 48 CFR 6101.19 (2016). The Board has thoroughly reviewed the parties' submissions, including the USFS's motion for judgment on the administrative record, Mr. Orr's cross-motion and various responses to the Government's motion, the USFS's reply, several declarations, and the exhibits in the appeal file. Those submissions establish that the allegedly defective direction, or absence of direction, that the USFS gave Mr. Orr regarding disposal of his solid waste occurred before Mr. Orr signed a full release of claims under the resource order and that Mr. Orr should have been aware of the defect before signing the release. As we explain below, because Mr. Orr signed a full release of claims without mentioning that the USFS had not given him valid instructions for disposing of the solid waste captured during resource order performance, we deny the portion of Mr. Orr's claim that is still pending before us.

Findings of Fact

I. The I-BPA

On April 9, 2013, the USFS awarded Mr. Orr an I-BPA for the supply of weed washing equipment and associated services for use in Regions 2 and 4 (Rocky Mountain and Intermountain Regions) during fire suppression and all-hazard incidents. Appeal File, Exhibit A at 1.[2] Weed washing involves the use of portable commercial high-pressure/low-volume power washers in washing fire engines, heavy equipment, logging equipment, and other vehicles to remove soil, plant parts, and seeds from them. *Id.* at 28-30. The I-BPA,

[2] All exhibits referenced in this decision are found in the appeal file, unless otherwise noted.

which identified the contractor's place of business as being located in Salmon, Idaho, was to be effective for three years from the date of award. *Id.* at 1, 25. Pursuant to the terms of the I-BPA, the USFS would issue an unspecified number of orders to Mr. Orr, called "resource orders," and Mr. Orr, in response, would choose which, if any, of the orders to accept. *Id.* at 28-29.

Once Mr. Orr accepted an order, he would be "responsible for [providing] all equipment, transportation to/from incident, and setup/takedown necessary to meet or exceed the Agreement specifications." Exhibit A at 28. He would also be responsible for providing at least two skilled and knowledgeable operators who would thoroughly wash all vehicles and equipment being used in fire suppression efforts to remove any soil, plant parts, and/or seeds from their undercarriages, cross-members, frames, belly pans, bumpers, wheel wells, and radiator grills of those vehicles and equipment. *Id.* at 28-30.

The I-BPA placed on the USFS the burden of either removing any solid waste captured as a result of the weed washing efforts or designating an appropriate disposal site. Exhibit A at 28 ("The Government will . . . [r]emove solid waste or designate an appropriate disposal site."). The solid waste that is typically captured during weed washing work is composed of non-hazardous mud, soil, small particulate matter, and seeds from weeds and other plants that fall from the undercarriages of the firefighting vehicles during the washing process. Declaration of David V. Haston ¶ 9 (Jan. 20, 2017); Declaration of Kyah LaPorta ¶ 11 (Jan. 25, 2017) (LaPorta Declaration); Declaration of Jan Williams ¶ 6 (Jan. 23, 2017) (Williams Declaration). It was Mr. Orr's obligation to gather any solid waste and package it, with appropriate labels, in transportable containment devices:

> The Contractor shall . . . [c]apture, package and label solid waste in secure, easily transportable containment packages/devices, approved by the government representative at the incident, and place them at a location specified by the government. Containers/packages of solid waste shall weigh no more than 50 lbs each.

Exhibit A at 28-29.

The I-BPA expressly precluded the contractor from disposing of solid waste on his own unless and until the Government had designated an acceptable disposal site:

> The Contractor shall not:
> Dispose of solid waste unless an acceptable disposal site is designated by the government for the waste to be disposed of; otherwise this is the responsibility of the government (The intention is to ensure proper disposal).

Exhibit A at 29; *see id.* at 29 (I-BPA section D.2.1.1(a)(6): "Solid waste shall be disposed of by the host agency unless an appropriate disposal site has been identified by the government."). Once the agency identified an appropriate disposal site, it became the contractor's responsibility to "dispose of the solid waste at this designated site." *Id.* at 29-30.

The I-BPA provided that, if and when Mr. Orr accepted a resource order that the USFS had issued, the USFS would soon thereafter give him, among other things, a resource order number, the name of the incident, the date and time that he needed to report to the incident, and an "[i]ncident contact phone number for further information." Exhibit A at 32-33. It also indicated that "[t]he Incident Commander or responsible Government Representative is authorized to administer the technical aspects of this agreement." *Id.* at 28.

Under a clause in the I-BPA titled "Payments," the USFS indicated that the host agency for each incident would be responsible for payment to the contractor, based upon the amount of time the "resource" was away from its point of hire:

> The time under hire shall start at the time the resource begins traveling to the incident after being ordered by the Government, and end at the estimated time of arrival back to the point of hire after being released, except as provided in [a provision not applicable here].

Exhibit A at 40. An appendix incorporated into the I-BPA defined the term "resource" as "[e]quipment, personnel, supplies, or a service used to support incidents." *Id.* at 54. The term "point of hire" was defined as "the resource location (City, State) the vendor designates in its offer." *Id.* Mr. Orr's point of hire was identified in the I-BPA as Salmon, Idaho.

The "Payments" clause also defined the manner in which Mr. Orr would be compensated for supplying weed washing equipment and personnel:

> Payment will be at rates specified and, except as provided in [a provision not applicable here], shall be in accordance with the following:
>
> (a) On-Shift includes time worked, time that resource is held or directed to be in a state of readiness, and compensable travel (resource traveling under its own power) that has a specific start and ending time.
>
> (b) Daily Rate – Payment will be made on basis of calendar days (0001 - 2400). For fractional days at the beginning and ending of time under hire, payment will be based on 50 percent of the Daily Rate for periods less than 8 hours.

Id. at 40-41. That clause also provided that "[t]he vendor will be paid for travel to and from the incident from the equipment City and State they designated in their offer," but that the "[v]endor must meet date and time needed." *Id.* at 41. It further provided that "[l]ump-sum payment will normally be processed at the end of the emergency assignment," although "partial payment may be authorized as approved by the incident agency." *Id.* "Payment for each calendar day" was to "be made for actual units ordered and performed under Daily rates." *Id.*

The I-BPA established an invoicing process that the contractor was to follow to receive payment. The invoicing clause provided that, "[a]fter each operational period worked, time will be verified and approved by the Government Agent responsible for ordering and/or directing use [of] the resource." Exhibit A at 42. After both the Government and the contractor verify the hours worked, "[t]he Finance Unit or designated representative will receive [the] vendor[']s commercial invoices and documents providing itemized breakdown charges" and "will validate [them] with shift tickets, review, sign, and submit to the payment center." *Id.* at 42-43. "When the resource is released to return to the Designated Dispatch Point (DDP), the Finance Unit will sign commercial invoices and submit them to the payment center." *Id.* at 43. "The incident will [then] submit a payment package including all signed originals, including a detailed invoice that supports each day[']s activity" and other documentation, "to the designated payment office." *Id.*

The I-BPA incorporated by reference FAR 52.212-4, Contract Terms and Conditions – Commercial Items, Exhibit A at 23, which provided that "[c]hanges in the terms and conditions of this contract may be made only by written agreement of the parties." 48 CFR 52.212-4(c) (2013).

II. The Bobcat Fire Resource Order

On August 20, 2015, the Central Idaho Interagency Fire Center placed resource order no. E-60 under Mr. Orr's I-BPA for a weed washing unit for the Bobcat fire outside Salmon, Idaho. Exhibit B at 79. Mr. Orr accepted the order. The agency indicated on the resource order that the incident site at which the equipment was needed was a driving distance of 7.1 miles from Salmon. *Id.* On the resource order was a telephone number for the Central Idaho Interagency Dispatch. *Id*. The dispatch center provided assistance seven days a week from mid-June to mid-October 2015, and an on-call dispatcher was available twenty-four hours a day, seven days a week, during that period to provide guidance and assistance to vendors. Declaration of James Tucker ¶ 6 (Jan. 21, 2017); Williams Declaration ¶ 5.

III. Performance Under the Resource Order

Mr. Orr arrived at the incident site on August 21, 2015, to set up his weed washing equipment. During that set-up, the lead on-site resource advisor, who was an employee not of the USFS but of the Department of the Interior's Bureau of Land Management (BLM), informed Mr. Orr that solid waste material was "usually double bagged and taken to the local landfill." Declaration of James Townley ¶ 3 (Jan. 20, 2017). There was an initial dispute upon Mr. Orr's arrival about whether he had set up the equipment properly in accordance with I-BPA requirements, and he was required to relocate his equipment. Exhibit D at 140-44. It was not until the next day, August 22, 2015, that Mr. Orr, assisted by three employees (William D. Maupin, Paul Fisher, and Luther Phillips), was ready to perform the work required by the resource order. Exhibit D at 180. During pre-inspection of Mr. Orr's weed washing unit on August 22, 2015, Ms. Kyah LaPorta, the USFS representative assigned as the incident manager for the E-60 Bobcat fire incident site, informed Mr. Orr that he did not have, as required under the I-BPA, a method in place to deposit and label solid waste and that he needed to correct that deficiency. Exhibit A at 29; Exhibit D at 135, 140. Nevertheless, she and her on-site trainer, Mr. Larry Sinclair, allowed work under the resource order to begin, and Mr. Orr and his employees completed the assignment on August 25, 2017.

Amongst her many other job assignments, Ms. LaPorta was responsible for coordinating the removal of any liquid and solid waste collected as a result of the work performed under the E-60 Bobcat fire resource order and/or designating an appropriate disposal site. LaPorta Declaration ¶ 3. The BLM on-site resource advisor suggested that Ms. LaPorta contact a local contractor, Pep's Septic Plumbing, LLC (Pep's), to assist in disposing of both liquid and solid waste from contractors' weed washing stations. Pep's, which specializes in septic tank cleaning and pumping, was listed in the Virtual Incident Procurement Program (VIPR) as a vendor capable of providing firefighting incident support, and it had been dispatched to the Bobcat fire on August 18, 2015, to service port-a-potties and wash stations on a daily basis. Declaration of Ed Peterson ¶¶ 2-3 (Jan. 21, 2017) (Peterson Declaration).

On the morning of August 24, 2015, Ms. LaPorta asked Ed Peterson, the owner of Pep's, to collect the waste generated from Mr. Orr's weed wash station and dispose of it at a site that the BLM resource advisor had designated. LaPorta Declaration ¶ 8. It appears from the record that there was a slight misunderstanding between Ms. LaPorta and Mr. Peterson about the scope of Ms. LaPorta's request. Ms. LaPorta's records indicate that she verbally asked Mr. Peterson to take care of both the liquid and solid waste at Mr. Orr's work site. In the fast-paced atmosphere associated with efforts to suppress an active fire at an incident site, though, the direction as Mr. Peterson understood it (in line with the type of

work that his business normally performs) was to remove the liquid waste. Peterson Declaration ¶ 3. Mr. Peterson, who was demobilizing from the Bobcat fire site that morning to move immediately to work another fire incident (the Elevenmile fire) at Challis, Idaho, went to Mr. Orr's work area on the afternoon of August 24 after completing some other work in the area and cleaned out the liquid waste. Ms. LaPorta was attending to other duties and was not at the site of Mr. Orr's equipment when Pep's came to remove the waste, but she had informed Mr. Orr earlier that day that Pep's would take *both* his liquid and solid waste while restating the importance of having Mr. Orr properly label the solid waste. LaPorta Declaration ¶ 8. When Mr. Peterson arrived to remove waste from Mr. Orr's equipment, no one (including Mr. Orr) said anything about Pep's taking solid waste, and Mr. Peterson did not see any such waste. Peterson Declaration ¶ 3. Mr. Peterson disposed of the liquid waste at an approved water treatment plant and immediately remobilized at the Elevenmile fire. *Id.* ¶¶ 3-4.

On the morning of August 25, 2015, it was announced that the entire Bobcat fire incident management team would be released from the Bobcat fire at 5 p.m. that day for reassignment to the Elevenmile fire. LaPorta Declaration ¶ 9. As part of her overall effort to wrap up activities at the Bobcat fire site, Ms. LaPorta wanted to close out Mr. Orr's weed washing unit resource order and release his equipment before she had to move to the Elevenmile fire incident site. She went to Mr. Orr's weed washing station that afternoon to discover that the solid waste material was still on the site, inside a black plastic bag in a container that Mr. Orr had not labeled. *Id.* Because of difficulties in dealing with additional issues associated with closing out Mr. Orr's resource order unrelated to the solid waste disposal issue, as well as her other close-out responsibilities at the Bobcat fire incident site, Ms. LaPorta was unable to complete the Orr resource order close-out before she had to depart for the Elevenmile fire site. *Id.* ¶¶ 9-10. As she was departing the Bobcat fire site, Ms. LaPorta handed over her remaining duties, including coordination for the disposal of the weed washing waste materials, to Mr. Sinclair, who was the USFS fleet manager for the Salmon-Challis National Forest. *Id.* ¶ 10. Ms. LaPorta provided Mr. Sinclair with Mr. Peterson's business card and asked him to contact Mr. Peterson to have Pep's remove the Orr weed washing solid waste materials. *Id.*

At approximately 4:30 p.m. on August 25, 2015, while Mr. Orr and his employees were packing up at the Bobcat fire site, Mr. Orr asked Mr. Sinclair what to do with the solid waste. Appellant's Submission at 2 (Dec. 1, 2016); Declaration of William D. Maupin, Paul Fisher, & Luther Phillips at 1 (Mar. 24, 2017) (Employees Declaration). By this point in time, Pep's, which Ms. LaPorta thought she had assigned to take Mr. Orr's solid waste, had already moved to the Elevenmile fire, rendering it unavailable to take the waste. One of Mr. Orr's employees asked Mr. Sinclair whether he should load the bags of solid waste that had been captured – bags of mud, seeds, and small particulate matter – into Mr. Sinclair's pickup

truck.[3] Declaration of William D. Maupin at 1 (Mar. 21, 2017) (Maupin Declaration). Mr. Orr alleges that, after Mr. Sinclair allegedly said that he did not want the waste in his pickup truck, Mr. Sinclair told Mr. Orr to "wait a second," made a short telephone call, and then told Mr. Orr to "take [the solid waste] to the SO," meaning the USFS's Salmon-Challis National Forest Supervisor's Office (also known as the Salmon Office) in Salmon, Idaho. Appellant's Submission at 2 (Dec. 1, 2016). Mr. Orr's statement is corroborated by declarations from Mr. Orr's three employees (William D. Maupin, Paul Fisher, and Luther Phillips), all of whom aver that they were present during the conversation between Mr. Orr and Mr. Sinclair. For his part, Mr. Sinclair, in his declaration, asserts that the allegation "is unequivocally and blatantly false and [that he] vehemently den[ies] having ever said anything of the kind!" Declaration of Larry T. Sinclair ¶ 4 (Jan. 25, 2017). Mr. Sinclair's statement is supported by Mr. Orr's original submission to the contracting officer dated January 21, 2016, in which Mr. Orr asserted that, when demobilizing from the Bobcat site, he was "instructed to remove the solid waste from the site but had no instruction as to where to dispose of it." Exhibit C at 121.

Whatever the direction (or lack thereof) for solid waste disposal was, it is clear that Mr. Sinclair released the weed washing equipment from the incident site at approximately 7:15 p.m. on August 25, 2015. Exhibit D at 146-47, 177. Mr. Orr and his employees immediately removed the weed wash equipment from the Bobcat fire incident site. Mr. Orr's employees loaded the solid waste into the back of Mr. Orr's 2012 Dodge Ram pickup truck, and Mr. Orr departed the incident site in his truck.

IV. Execution of a Release

On the next day, August 26, 2015, Mr. Orr either returned to the Bobcat fire incident site or went to the Salmon Office – the record does not make clear which – to close out his

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[3] The parties argue in their briefs at length about the amount of solid waste that was allegedly captured. Mr. Orr avers that the solid waste material was contained in seven bags weighing 350 pounds. *See* Appellant's Submission at 2 (Dec. 1, 2016); Employees Declaration at 1. The USFS has submitted several declarations indicating that it would have been impossible for Mr. Orr to have collected that much solid waste in four days of weed washing and that, at most, the waste filled a "five gallon bucket." *See, e.g.*, LaPorta Declaration ¶ 11. We need not resolve this factual dispute because the specific amount of solid waste that Mr. Orr captured is irrelevant to the resolution of this appeal. Although both parties believe that this factual dispute needs to be resolved as a matter of principle, it is not the Board's function to resolve disputes that ultimately have no effect on the monetary issues before the Board. *See Octagon Process Inc.*, GSBCA 1004, 1963 WL 899 (Oct. 25, 1963).

resource order. Declaration of Thomas R. Geiser ¶ 3 (Sept. 28, 2016) (Geiser Declaration). Under the invoicing clause of the I-BPA, to obtain payment from the USFS, Mr. Orr would have to have presented documentation showing the length of his work on the site and that he had been released from the project, although the record here is devoid of any evidence about what Mr. Orr presented to obtain payment. The USFS receiving officer assigned to close out various resource orders, Thomas R. Geiser, prepared a draft invoice (on Optional Form 286) indicating that Mr. Orr had worked on the order from August 22 through 25, 2015, and was entitled to payment at daily rates totaling $5860. *See* Exhibit D at 180; Geiser Declaration ¶ 4. Mr. Geiser asked Mr. Orr to review the draft invoice and to make sure that there were no errors so that payment could be expedited. Geiser Declaration ¶ 4. The invoice contained the following pre-printed release language:

> Contract Release For And In Consideration Of Receipt Of Payment In The Amount Shown On "Net Amount Due" Line 28 [$5860]. Contractor Hereby Releases The Government From Any And All Claims Arising Under This Agreement Except As Reserved In "Remarks" Block 22.

Exhibit D at 180. In block 22, titled "Remarks," was the pre-printed word "Final," and Mr. Geiser handwrote the words "No Damage No Claims" in block 22. *Id.*

Mr. Orr reviewed the draft invoice, with the words "No Damage No Claims" on it, and signed it. As we held in our October 18, 2016, decision, Mr. Orr did not sign the release under duress. *Sylvan B. Orr*, 16-1 BCA at 177,925-27. Neither before nor after signing the invoice and release did Mr. Orr mention to Mr. Geiser that there was an outstanding issue about disposing of solid waste.

V. Solid Waste Disposal Efforts

It is unclear from the record whether Mr. Orr signed the invoice containing the release before or after he first attempted to deliver solid waste to the Salmon Office. Either way, Mr. Orr alleges that, beginning August 26 and continuing through August 31, he continually drove his 2012 Dodge Ram pickup truck to and from the Salmon Office to try to find a way to dispose of the solid waste and that his employee, Mr. Maupin, accompanied him for four of those six days. Appellant's Submission at 2-3 (Dec. 1, 2016); Exhibit D at 163. He alleges that, on the first visit on August 26, Mr. Sinclair was at the Salmon Office and declared that he "did not have time" to deal with Mr. Orr. Exhibit D at 163. Mr. Orr apparently kept the solid waste in his truck and took it home with him. During each of his six daily trips to the Salmon Office, Mr. Orr allegedly asked various individuals – random USFS or BLM employees who were stationed in the Salmon Office (including a BLM temporary hire who happened to be walking by, to whom Mr. Orr talked for a large part of a day), none of whom

had any responsibility for Mr. Orr's resource order – about solid waste disposal, but none of them knew how to handle or dispose of Mr. Orr's waste. Appellant's Submission at 3; Maupin Declaration at 1.

On August 31, 2015, Mr. Orr received a telephone call at approximately 9:00 a.m. from Paul Chase, a USFS employee working out of the Salmon Office, telling him that Mr. Chase could accept the solid waste. Exhibit D at 163. Mr. Orr delivered the solid waste packages to the Salmon Office and received a receipt on a pre-printed card titled "Emergency Equipment Shift Ticket," signed by Mr. Chase. Exhibit D at 163, 166.

VI. Claim Submission and Appeal

On September 25, 2015, as supplemented on January 21, 2016, Mr. Orr submitted a claim to the contracting officer seeking, among other things, $8790 for six days of trying to deliver solid waste from August 26 to 31, 2016. Exhibit C at 81-119, 121-22. Mr. Orr calculated that $8790 amount by multiplying the daily rate for the E-60 weed washing station of $1465 by six. Exhibit C at 121-22. On March 18, 2016, the USFS contracting officer issued a decision denying all of Mr. Orr's claims, including his solid waste disposal claim, finding the solid waste claim barred by the release that he had signed. Exhibit E at 199.

On April 26, 2016, Mr. Orr appealed the contracting officer's decision to the Board. By decision dated October 18, 2016, we dismissed virtually all of Mr. Orr's appeal, but found that the USFS had not established, based upon the record before us at that time, that the release necessarily barred Mr. Orr's request for compensation for post-performance delays in solid waste disposal. *Sylvan B. Orr*, 16-1 BCA at 177,928. The parties subsequently requested that we decide the solid waste disposal issue on the basis of the administrative record pursuant to CBCA Rule 19. After the parties submitted substantial additional evidence and briefing, we closed the record on May 31, 2017.

Discussion

I. Standard of Review

The parties are entitled, under CBCA Rule 19, to include in the written record "(1) any relevant documents or other tangible things they wish the Board to admit into evidence; (2) affidavits, depositions, and other discovery materials that set forth relevant evidence; and (3) briefs or memoranda of law that explain each party's positions and defenses." *1-A Construction & Fire, LLP v. Department of Agriculture*, CBCA 2693, 15-1 BCA ¶ 35,913, at 175,551 (citing 48 CFR 6101.19(a)), *appeal dismissed*, No. 15-1623 (Fed. Cir. Jan. 28, 2016). Based on the parties' submissions, the Board is authorized to make findings of fact,

even if such findings require "credibility determinations on a cold [paper] record, without the benefit of questioning the persons involved," and can decide issues of law based on those factual findings. *Bryant Co.*, GSBCA 6299, 83-1 BCA ¶ 16,487, at 81,967.

Submission on the record under Rule 19 "does not alter the rules as to burden of proof" or "relieve the parties from the necessity of proving the facts supporting their allegations or defenses." *Raimonde Drilling Corp.*, ENGBCA 5107, 86-3 BCA ¶ 19,282, at 97,488 (discussing Corps of Engineers Board of Contract Appeals' rule similar to CBCA Rule 19). "'While [the Board] can make inferences from th[e] evidence and either accept or deny the probative value of documents, statements or other extrinsic evidence, in order for us to find for a party, that party's evidence must establish,' by a preponderance of the evidence, 'that it is entitled to relief.'" *1-A Construction*, 15-1 BCA at 175,551 (quoting *Schoenfeld Associates, Inc.*, VABCA 2104, et al., 87-1 BCA ¶ 19,648, at 99,472).

Because Mr. Orr is representing himself in this appeal, we have given him "greater procedural latitude," as a pro se appellant, "than we give to parties represented by lawyers." *1-A Construction*, 15-1 BCA at 175,551-52 (quoting *Greenlee Construction, Inc. v. General Services Administration*, CBCA 416, 07-1 BCA ¶ 33,514, at 166,062). "Nevertheless, 'this more lenient standard for interpreting pleadings does not change a pro se litigant's burden of proof or our weighing of the factual record.'" *Id.* (quoting *House of Joy Transitional Programs v. Social Security Administration*, CBCA 2535, 12-1 BCA ¶ 34,991, at 171,975).

II. The Release

In our decision of October 18, 2016, we dismissed that portion of Mr. Orr's claim seeking additional monetary compensation for work on August 21, 2015, which pre-dated his execution of a release on August 26, 2015. As we held in that decision, "a contractor who executes a general release is thereafter barred from maintaining a suit for damages or for additional compensation under the contract based upon events that occurred *prior to* the execution of the release." *Sylvan B. Orr*, 16-1 BCA at 177,924-25 (quoting *B.D. Click Co. v. United States*, 614 F.2d 748, 756 (Ct. Cl. 1980)). We recognized that, "'[i]f parties intend to leave some things open and unsettled, their intent so to do should be made manifest' in the release itself." *Id.* at 177,925 (quoting *United States v. William Cramp & Sons Ship & Engine Building Co.*, 206 U.S. 118, 128 (1907)). We rejected Mr. Orr's argument that he had signed the release under duress, *id.* at 177,925-27, and applied the release to bar his request for additional compensation for any pre-release work. *Id.* at 177,928.

In his complaint, though, Mr. Orr also claimed that he was forced to undertake efforts from August 26 to 31, 2015, to dispose of solid waste captured during his weed washing work – *after* he had finished all other resource order work and *after* he had signed the release.

We recognized in our original decision that, "[a]bsent special circumstances, a general release only serves to preclude those claims 'based upon events which occurred *prior to* the execution of the release.'" *Sylvan B. Orr*, 16-1 BCA at 177,928 (quoting *H.L.C. & Associates Construction Co. v. United States*, 367 F.2d 586, 590 (Ct. Cl. 1966)) (emphasis added). Mr. Orr appeared to allege that, *after* release execution, he received confusing directions about where to dispose of the solid waste that he had captured. The USFS had presented evidence disputing Mr. Orr's version of events, but the parties were responding to a show cause order, precluding us from resolving disputed issues of fact. *See id.* at 177,931 n.5. Based upon the record developed at that time, we found that the USFS had not established on undisputed facts that the release barred the solid waste disposal claim. *See Shell Oil Co. v. United States*, 751 F.3d 1282, 1297 (Fed. Cir. 2014) (burden of establishing validity and applicability of release is on the party seeking to enforce it).

The record has now been significantly supplemented with numerous declarations that explain the events that occurred during and after Mr. Orr's resource order performance. In a decision on an administrative record, we do not accept the factual allegations set forth in the pleadings as true or draw all reasonable inferences in favor of the non-moving party, but make findings of fact based upon the existing record, even if that evidence is conflicting. *1-A Construction*, 15-1 BCA at 175,551. Despite Mr. Orr's strong desire for us to do so, we find it unnecessary to decide whether, on August 25, 2015, Mr. Sinclair told Mr. Orr to take his solid waste to the Salmon Office or, instead, gave him no direction. Regardless of what Mr. Sinclair said or did not say on August 25, Mr. Orr released his solid waste disposal claim when he signed a release on August 26, 2015.

Mr. Orr's current allegation is that Mr. Sinclair told him on August 25, 2015, to take the solid waste to the Salmon Office for disposal, but gave him no further specifics about the drop-off. The Salmon Office is a 7.1-mile drive from the location where Mr. Sinclair allegedly gave the direction, back in the town where Mr. Orr lived and where he presumably would be heading for the night. The Salmon Office, as the record shows, is not a big building. All that Mr. Orr had to do was drive there on his way home and drop the solid waste off. Although Mr. Orr says that he could not have gotten a receipt for the waste if he simply dropped it off there, nothing in the I-BPA or the resource order indicates any requirement for a receipt. In fact, in situations like the one here where the agency is trying to respond to numerous active fires in an area, Mr. Orr's belief that there needed to be special procedures in place for dealing with the solid waste is unreasonable. The type of solid waste at issue here is non-toxic and non-hazardous, composed merely of mud, seeds, some plant material, and some small particulate matter. With such material, there is no reason for Mr. Orr to insist upon special procedures for delivery or deposit of his waste. A whole day went by after Mr. Orr allegedly received his disposal direction before he signed the release, and he mentioned nothing about solid waste when signing the release. If there was a known

problem with the direction that Mr. Sinclair had already given, or if Mr. Orr simply had not gotten around to dealing with the solid waste drop-off, he should have noted an exception on the release. At the very least, he should have mentioned it to Mr. Geiser of the USFS as he was signing the release, since Mr. Geiser presumably could have assisted in taking the waste. Mr. Orr did not do that. Because the allegedly defective direction preceded the release, and since Mr. Orr should have had time to realize any defects in that direction, Mr. Orr failed to preserve his claim for solid waste disposal problems by signing the release without mentioning those problems.

To the extent that, as Mr. Orr *originally* alleged, Mr. Sinclair failed to give him *any* solid waste disposal guidance at the August 25 close-out, Mr. Orr still waived his complaints about that lack of guidance by signing the release without mentioning the outstanding solid waste issues. He knew on August 24 that Pep's was supposed to take his solid waste, but he said nothing about solid waste when Pep's came by to take only his liquid waste. He knew when he signed the release on August 26 that no one had given him solid waste disposal instructions, but he said nothing. The contract's payment and invoicing clauses make clear that, except when the incident agency specifically approves otherwise, there was to be a single lump-sum payment for all work under the resource order. *See, e.g.*, Exhibit A at 41 ("[l]ump-sum payment will normally be processed at the end of the emergency assignment," although "partial payment may be authorized as approved by the incident agency"); *id.* at 43 ("When the resource is released to return to the Designated Dispatch Point (DDP), the Finance Unit will sign commercial invoices and submit them to the payment center."). Where the I-BPA envisioned a single final payment after completion of all work under a resource order, Mr. Orr should not have signed an invoice seeking that payment, with a release in it, without mentioning that he had no disposal instructions for solid waste still in his possession. His execution of such a release in such circumstances, while saying nothing about the solid waste, precludes his claim for costs that he subsequently incurred trying to dispose of that waste.

III. Mr. Orr's Entitlement Absent the Release

Even if the release did not bar Mr. Orr's solid waste disposal claim, we would be unable to find that Mr. Orr has established his right to any compensation for his August 26 through 31, 2015, efforts to dispose of solid waste.

Initially, we have to reject the USFS's suggestion that, because of the non-toxic nature of the solid waste at issue here, Mr. Orr should have just thrown it away in a trash bin somewhere. The I-BPA, the terms of which were incorporated into Mr. Orr's resource order, expressly stated that Mr. Orr was not allowed to dispose of solid waste generated from his weed washing activities "unless an acceptable disposal site is designated by the government

for the waste to be disposed of." Exhibit A at 29. The USFS cannot validly argue that Mr. Orr should have violated the express requirements of his agreement.

Nevertheless, to the extent that Mr. Sinclair told Mr. Orr to take the solid waste to the Salmon Office, Mr. Orr has identified no reason that the direction was defective. The direction that Mr. Sinclair allegedly gave was very general in nature, but the type of solid waste at issue here is plainly not dangerous. From the record, it is very clear that the Salmon Office, at least during firefighting operations, by necessity works in a fairly informal "seat-of-the-pants" manner. The formalities that Mr. Orr seeks to impose on dropping off his bags of waste at the Salmon Office are not found in the I-BPA or the resource order, and they are inconsistent with the firefighting activities that were happening while Mr. Orr was finishing his Bobcat fire incident work. Based upon the alleged direction from Mr. Sinclair, as Mr. Orr describes it, there was no reason for him not simply to leave the bags of waste at the Salmon Office.

To the extent that the USFS failed to provide Mr. Orr with *any* direction for his solid waste disposal, we would have to agree that the absence of direction could create a constructive change to Mr. Orr's agreement. "A constructive change occurs when a contractor performs work beyond the contract requirements, without a formal order under the Changes clause, either due to an informal order from, or through the fault of, the Government." *Nu-Way Concrete Co. v. Department of Homeland Security*, CBCA 1411, 11-1 BCA ¶ 34,636 (2010), at 170,696, *aff'd*, 449 Fed. App'x 945 (Fed. Cir. 2011). "[I]f the government was at fault in causing work to be done outside the scope of the contract, . . . [the appellant] is entitled to an equitable adjustment of price" for the constructive change. *LB&B Associates Inc. v. United States*, 91 Fed. Cl. 142, 153 (2010). To the extent that the lack of direction caused Mr. Orr to spend additional time trying to obtain the USFS's guidance on what to do with the solid waste, a compensable constructive change could result. Nevertheless, in such a situation, the contractor bears the burden of "proving the fact of loss with certainty, as well as the burden of proving the amount of loss with sufficient certainty so that the determination of the amount of damages will be more than mere speculation." *Willems Industries, Inc. v. United States*, 295 F.2d 822, 831 (Ct. Cl. 1961).

Mr. Orr says that he spent six days driving to and from the Salmon Office seeking direction as to what to do with the solid waste and that he is entitled to be paid for six days of work at the daily rate set forth in his I-BPA as a result. Even if the USFS caused a constructive change here, that would not be the correct remedy. The daily rate in the I-BPA was to cover the rental and use of the weed washing equipment that Mr. Orr owned, plus the services of at least two employees to run the equipment. Mr. Sinclair released the equipment and the employees on August 25, 2015, and the equipment was immediately removed from the Bobcat fire incident site and returned to Mr. Orr's control. Mr. Orr is not entitled to

apply the daily rate for his subsequent days of traveling to and from the Salmon Office when he had already repossessed the equipment that forms a large basis for that daily rate. The remedy for a constructive change typically focuses on the increase in *costs* that the contractor incurred as a result of the change. *Nu-Way Concrete*, 11-1 BCA at 170,698.

Further, any costs incurred have to have been reasonable, in accordance with the contractor's mitigation obligations in response to a constructive change. A non-breaching party has an obligation to attempt to mitigate damage following a constructive change, and it "cannot recover damages for loss that [it] could have avoided by *reasonable efforts*." *Indiana Michigan Power Co. v. United States*, 422 F.3d 1369, 1375 (Fed. Cir. 2005) (quoting *Robinson v. United States*, 305 F.3d 1330, 1333 (Fed. Cir. 2002)) (emphasis in original); *see Restatement (Second) of Contracts* § 350 (1981) ("damages are not recoverable for loss that the injured party could have avoided without undue risk, burden or humiliation"); *Midwest Industrial Painting of Florida, Inc. v. United States*, 4 Cl. Ct. 124, 133 (1983) ("a nonbreaching or injured party must take reasonable steps to avoid incurring damage as a result of the other party's action"). If the non-breaching party fails to make any attempt to mitigate his damages, but instead merely seeks to impose all loss, even if it could have been avoided, on the breaching party, the non-breaching party will be precluded from recovering that amount of loss which could have been avoided. *Toledo Peoria & Western Railway v. Metro Waste Systems*, 59 F.3d 637, 640 (7th Cir. 1995); *Midwest Industrial*, 4 Cl. Ct. at 133. This rule "reflect[s] the policy of encouraging the injured party to attempt to avoid loss." *Restatement (Second) of Contracts* § 350 cmt. a.

Regardless of whether Mr. Orr was directed to take the solid waste to the Salmon Office or left the Bobcat incident site without any clear designated disposal site, Mr. Orr was under an obligation to mitigate his damages. Mr. Orr's decision to drive to the Salmon Office six days in a row, in his pickup truck, and to spend each day there in an attempt to dispose of the solid waste was unreasonable. There was a telephone number on his resource order providing twenty-four-hour-a-day/seven-day-a-week contact coverage for vendors. Mr. Orr never called it. He also never called Ms. LaPorta, whose telephone number he had, or any other USFS employee associated with his resource order to attempt to obtain disposal information. He merely kept going back to the Salmon Office and talked with people who had nothing to do with his resource order. It is possible that, during these visits, Mr. Orr was also hoping to pick up some of the Elevenmile fire incident work that was ongoing at that time, but, if that was an incentive to visit the Salmon Office, it does not justify a failure to contact potentially knowledgeable individuals by telephone to deal with the solid waste disposal matter in an efficient manner. The absence of telephonic efforts conflicts with the obligation to attempt to mitigate damages.

At best, Mr. Orr's reasonable costs, had there been a constructive change, would have been (1) his costs associated with telephone calls to an appropriate person or office to get disposal instructions; (2) vehicle and fuel expenses for the few miles that it would have taken to drive from his home in Salmon (the point of hire identified in his I-BPA) to the Salmon Office;[4] and (3) any costs that he might have incurred for having to pay an employee to travel with him to unload the solid waste. Yet, Mr. Orr has placed no evidence about any such costs in the record – no employee payroll records, no fuel expense record, and no mileage calculations. We specifically notified Mr. Orr in our orders scheduling briefing on the parties' cross-motions on the administrative record and during a telephonic conference call with the parties during the briefing process that he would need to present evidence regarding his actual costs incurred as a result of the USFS's direction (or lack thereof). He put nothing about costs in the record in response. As stated above, it is the appellant's burden to prove his damages with sufficient certainty so that "the determination of the amount . . . will be more than mere speculation." *Willems Industries*, 295 F.2d at 831. Although a board may sometimes resort to a "jury verdict" award if costs cannot be established with mathematical precision, such an approach is inappropriate if the appellant has simply not bothered to submit existing evidence of the increased costs that it suffered or to explain why such evidence is unavailable. *Servicemaster of West Central Georgia*, DOT CAB 1096, 80-2 BCA ¶ 14,676, at 72,387. Here, that is the situation we face. We give pro se appellants some procedural latitude, but not to the extent that it eliminates or reduces their burden of proof. *1-A Construction*, 15-1 BCA at 175,551. Mr. Orr has failed to prove damage as a result of any delay in the solid waste disposal instruction.

IV. Bad Faith

Mr. Orr generally complains that the USFS employees have acted in bad faith towards him. In support of this assertion, he identifies the poor evaluation that he received for performance under this resource order, which he views as "a record of the hostility" against him; the fact that the USFS pre-inspection team did not think that his first-day set-up

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[4] To the extent that Mr. Orr might be asserting that he was traveling back and forth to the Salmon Office not from his home in Salmon, but from his son's home in Idaho Falls, Idaho (a round-trip drive of more than five hours each day), he could not recover those extra travel costs. His I-BPA indicated his point of hire as Salmon. To the extent that he unilaterally elected to travel to and from Idaho Falls, rather than Salmon, such travel costs are not envisioned by his I-BPA. *See Western Aviation Maintenance, Inc. v. General Services Administration*, GSBCA 14165, 00-2 BCA ¶ 31,123, at 153,740 ("Breach damages are recoverable only if, at the time the contract was made, the breaching party had reason to foresee that such damages were the probable result of a breach.").

complied with USFS requirements and required him to remobilize his unit in a slightly different manner and location; representations in early internal USFS email messages from Mr. Sinclair that could be read as indicating that Mr. Sinclair was not at the Bobcat fire incident, even though he was; a generalized assertion that Mr. Sinclair was using his position to sabotage Mr. Orr's work and to harass Mr. Orr; another USFS employee's internal report complaining that Mr. Orr's equipment was in poor condition and recommending against using Mr. Orr for future assignments; and disagreements with the USFS's statements about how much solid waste can be captured from weed washing. Appellant's Objection to Summary Disposition at 14-25 (Mar. 27, 2017); Appellant's Statement of Genuine Issues at 5 (Mar. 27, 2017).

It requires "well-nigh irrefragable proof" to induce a tribunal to abandon the general presumption that government officials act in good faith. *Kalvar Corp. v. United States*, 543 F.2d 1298, 1301-02 (Ct. Cl. 1976) (quoting *Knotts v. United States*, 121 F. Supp. 630, 631 (Ct. Cl. 1951)). "That 'irrefragable proof' has been equated with evidence that the Government had a specific intent to injure the contractor, an intent that must be shown by clear and convincing evidence." *1-A Construction*, 15-1 BCA at 175,561 (citation omitted). "[G]ood faith is presumed unless bad faith is shown." *Torncello v. United States*, 681 F.2d 756, 771 (Ct. Cl. 1982). Mr. Orr's allegations are generally based on supposition and suspicion, which are insufficient to support a claim for bad faith. *1-A Construction*, 15-1 BCA at 175,561. Mr. Orr may disagree with poor assessments of his equipment and may not like that some USFS employees were frustrated while dealing with him, but those disagreements do not establish bad faith.

Decision

For the foregoing reasons, those portions of this appeal that were not previously dismissed are **DENIED**.

HAROLD D. LESTER, JR.
Board Judge

We concur:

ALLAN H. GOODMAN
Board Judge

MARIAN E. SULLIVAN
Board Judge