DISTRICT OF COLUMBIA CONTRACT APPEALS BOARD

APPEAL OF:

ADSYSTECH, INC.	)	
	)	CAB No. D-1210
Under Contract No. 9066-AA-NS-2-MT	)	

For the Appellant: Lloyd J. Jordan, Esq. For the Appellee: Robert Dillard, Esq., Assistant Attorney General, Office of the Attorney General, Matthew Lane, Esq. (entered appearance after post-hearing briefs)

Opinion By: Chief Administrative Judge Marc D. Loud, Sr., with Administrative Judge Maxine E. McBean, concurring.

DECISION AND MEMORANDUM OPINION

Filing ID 53755235

This is a dispute action brought by Adsystech, Inc. (Adsystech or appellant) against the District (District or appellee) alleging the non-payment of $757,470 for services rendered to upgrade the D.C. Department of Consumer and Regulatory Affairs' (DCRA) information technology systems with the "Hansen Version 7 PERMITS" software (Hansen or Hansen upgrade). Appellant seeks an equitable adjustment on the grounds that constructive changes were directed and/or ratified by authorized District officials. The appellant also seeks recovery under common law theories of promissory estoppel and quantum meruit. The District contends that (i) the Anti-Deficiency Act bars payment, (ii) the mandatory ratification procedures required by former D.C. Code § 2-301.05(d)(5) were not followed herein, (iii) former D.C. Code § 2-301.05(d)(3) bars oral contracts, (iv) equitable adjustment cannot be invoked to authorize a payment exceeding a District purchase order, and (v) the Board lacks jurisdiction over quantum meruit claims. The Board conducted a trial from June 21-22, 2010, hearing testimony from five witnesses called by the parties.[1]

Upon review of the record herein, and for the reasons set forth more fully below, the Board finds that the appellant is entitled to an equitable adjustment for services it performed in excess of the parties' contract at the request of authorized District officials. This case is remanded to the appellee for a determination of quantum. The Board directs the parties to negotiate in good faith, and to inform the Board of the disposition status within 30 days.

BACKGROUND

The backdrop to the instant dispute is as follows. During the latter part of 1999, the

[1] The trial was conducted by a previous Board panel; none of whom are presently members of the Board. The present Board panel has reviewed the trial transcript, appeal file, appeal file supplement, hearing exhibits, post hearing briefs, and the entire record herein in rendering this decision.

DCRA sought to acquire a new information technology system to replace its antiquated department hardware and applications as part of the District's Y2K initiative.[2] Hr'g Tr. vol. 2, 448:15-452:20, June 22, 2010. Based on a KPMG study of commercial-off-the-shelf products and the results of a pilot program with Adsystech, DCRA decided that the Hansen software was the best available product. Hr'g Tr. vol. 1, 17:4-19:7, June 21, 2010. The Hansen software was a suite of municipal government products which offered a permit and licensing function sought by DCRA. Hr'g Tr. vol. 1, 18:15-20. Adsystech's CEO described the software as a "blank sheet of paper" which provides a "framework and a structure" that a vendor develops into a workable product for a particular client. Hr'g Tr. vol. 243:1-244:10.

From the outset, the parties agreed that DCRA's total system upgrade would entail the implementation of 221 processes within DCRA at an estimated cost that exceeded $2 million dollars. Hr'g Tr. vol. 1, 19:8-22:5; Hr'g Tr. vol. 2, 459:6-463:7. The 221 processes were derived from the KPMG study. Hr'g Tr. vol. 1, 228:22-231:13. The record denotes the 221 processes were divided among DCRA's internal administrations as follows: Building Land Regulation Administration (BLRA)(78 processes), Business Regulation Administration (BRA)(102 processes), and Housing Regulation Administration (HRA)(41 processes). Appellee's Hr'g Ex. 3; *see also* Hr'g Tr. vol. 2, 231:3-232:18.

Because DCRA only had $711,000 in funding, the parties decided to procure the Hansen upgrade through two contracts issued across separate fiscal years.[3] Hr'g vol. 1, 24:19-25:8; 26:18-46:1; 60:2-62:22; Hr'g Tr. vol. 2, 464:10-465:4. The first contract was entered into on June 18, 1999, for $711,039 (first contract or June 18 contract).[4] Appellant's Hr'g Ex. 6; *see also* Hr'g Tr. vol. 1, 16:1-18:3; 22:20-25:8. The parties agreed that Adsystech would only implement 11 of the 221 processes under the first contract. Hr'g Tr. vol. 1, 22:20-25:8; 58:2-59:4, 59:15-60:6. *See also* Appellee's Hr'g Ex. 3, Task 7. Neither party has presented the Board with a complete original or copy of the June 18 contract. The contract originally consisted of 10 pages, yet only the first page has been entered into our record.

The second contract was entered into on October 25, 1999 (second contract or October 25 contract) through a "Purchase Notification" for $476,317.[5] Appellant's Hr'g Ex. 7; *see also* Hr'g Tr. vol. 1, 61:12-63:1. The appellant contends that the second contract was a "time and materials" contract. Appellant's Post Hr'g Br. 7-8, Proposed Finding of Fact 21. The District's

---

[2] Y2K refers to the Year 2000. As Y2K approached during 1998-2000, most public and private sector entities were undertaking massive computer system upgrades to prevent service lapses as they anticipated that most computers would not recognize dates beyond the year 1999. *See* discussion *infra* at p.19.

[3] Adsystech's Director of business development offered an alternative explanation for why the Hansen procurement was done in "bite-size chunks." He testified that the procurement was separated in "order to not take it to the Control Board[,]" which he testified was a requirement for contracts over $1 million dollars. Hr'g Tr. vol. 2, 463:9-464:9.

[4] Adsystech's CEO testified that the June 18 contract was a firm-fixed price contract. Hr'g Tr. vol. 1, 71:12-13. This contention is not disputed by the District. Appellee's Post Hr'g Br. 7, Proposed Finding of Fact 3.

[5] The Board defines the "purchase notification" herein as a contract. At all times material to the instant dispute, the definition of "contract" included "task order" and "purchase order." D.C. Code § 2-301.07(13)(B),(D) (repealed Apr. 8, 2011). Interestingly, the District identifies the purchase notification as a "contract" in its October 25, 1999, transmittal to the Council of the District of Columbia. *See* Appellee's Hr'g Ex. 5. Per the record, "purchase notification" is described as a term used interchangeably with "purchase order." Hr'g Tr. vol. 2, 501:8-502:2. District witness Bruce Witty, the contracting officer herein, stated that a purchase notification becomes a "contract" once performance begins. Hr'g Tr. vol. 2, 506:13-507:15.

post-hearing brief disputes this, but at trial its key witness testified that in paying Adsystech's invoices, the District had treated the contract as a time and materials one. Hr'g Tr. vol. 2, 508:16-509:14. The parties agreed that Adsystech would implement the remaining 210 processes under the second contract. Hr'g Tr. vol. 1, 61:12-63:1.[6] The second contract consists of only one-page, and provides very minimal scope, stating that Adsystech's services are for "continuation of [s]ervices for Task #2 on Enterprise Systems to complete [a]ll departments." Appellant's Hr'g Ex. 7; AF Ex. 2; Hr'g Tr. vol. 1, 61:12-63:1.

Before proceeding further with a detailed discussion of contract terms and performance, it is important to note that Adsystech's required performance under both contracts was grounded upon the statement of work developed for the June 18 contract. Hr'g Tr. vol. 1, 22:6-24:7; 41:9-16; vol. 2, 311:21-313:11; 501:8-503:2. We have relied on the June 18 statement of work for that purpose as well because the original contract has been lost. It is well settled that parol evidence is admissible to establish the terms of a lost or missing contract (or instrument), where a party testifies that the contract has been lost, and the substance of the agreement is proved satisfactorily by the parol evidence. *See Tayloe v. Riggs*, 26 U.S. 591 (1828); *Edmunds v. Jelleff*, 127 A.2d 152 (D.C. 1956). In this case, it is clear that the contract has been lost. Hr'g Tr. vol. 2, 500:2-505:14. Moreover, we believe that the statement of work for the June 18 contract sufficiently proves the contract terms herein, and note that the appellee has not disputed such. Appellee's Hr'g Ex. 3.

Thus, we find the statement of work admissible and competent to establish the contract terms entered into by the parties herein. The referenced statement of work outlines 10 Tasks that Adsystech was to perform to complete DCRA's upgrade to the Hansen system. Appellee's Hr'g Ex. 3. These tasks included, but were not limited to, a kick-off meeting, the development of a project implementation plan, acquisition of licenses for the Hansen software, training, Adsystech's review and validation of DCRA delivered "as is" process flows,[7] data conversion, etc. *Id.*

Following the parties execution of both contracts, Adsystech was able to begin performance on DCRA's system overhaul.[8] Once performance began, however, Adsystech was advised by DCRA official "Theresa Lewis" (Lewis) not to use the KPMG study to complete the "to-be" processes of the Hansen upgrade.[9] Hr'g Tr. vol. 1, 52:16-53:11, 55:16-56:8; 63:19-65:4; 219:5-220:20; 233:22-234:20. The KPMG study was deemed "horrible" as to the Business Regulation Administration, "fair" as to the Housing Regulation Administration, and "very reasonable" as to the Office of Adjudication's requirements. Hr'g Tr. vol. 2, 358:18-362:11.

The record suggests that there were numerous District officials with whom Adsystech

---

[6] *See also* Appellant's Post Hr'g Br. 7-8, Proposed Finding of Fact 21; Appellee's Post Hr'g Br. 7, Proposed Finding of Fact 4.

[7] An "as-is" process flow is one that documents how DCRA conducted business prior to the Hansen implementation. Hr'g Tr. vol. 2, 227:18-228:3 (testimony of the Adsystech project manager).

[8] Adsystech's project manager testified that prior to execution of the second contract, Adsystech's performance consisted of procuring the Hansen licenses, tools, and maintenance agreement. Hr'g Tr. vol. 2, 320:11.

[9] A "to be" process identified how DCRA wanted to conduct its business operations in the future. Hr'g Tr. vol. 1, 234:21-235:10 (Adsystech project manager). As context, the Adsystech project manager explained that DCRA did not want to pay Adsystech to implement a system that needed to be changed in later years. *Id.* at 235:7-9.

dealt during the life of the contract. The parties' June 18 contract was signed by "Richard P. Fite" as contracting officer, although Fite disappears from the record completely thereafter. Appellant's Hr'g Ex. 6. The parties' October 25 contract was signed by "Suzanne J. Peck" as contracting officer. Appellant's Hr'g Ex. 7. At the time, Peck was also the District's Chief Technology Officer. *Id*. Bruce Witty is also identified as a contracting officer herein but testified that he "struggl[ed] with that role because he signed no contracts[.]" Hr'g Tr. Vol. 2, 491:3-15. Adsystech's project manager[10] testified that no one identified themselves as contracting officer on the DCRA contract. Hr'g Tr. vol. 2, 440:6-13.

The above notwithstanding, Theresa Lewis emerges as the one District official exercising day-to-day authority over all aspects of the Hansen upgrade contract. Although she did not testify at the hearing, she is described by appellant's and appellee's witnesses alike as the singular District official in charge of the upgrade. Adsystech's project manager described Lewis as "the one point person appointed by the [DCRA] Director" for the project, "the key person in charge of all of the various DCRA divisions" acquiring the Hansen system, and the person exercising "direction or control" over the parties' contract. Hr'g Tr. vol. 2, 238:10-17; 438:22-442:20. Adsystech's project manager further testified that contracting officer Bruce Witty "confirmed Theresa Lewis as the person for all requirements[.]" Hr'g Tr. vol. 1, 239:13-240:19. Adsystech's business development director testified that "Theresa knew DCRA like the back of her hand. She understood all the applications… knew exactly how things were managed, run. She was just a wealth of knowledge[.]" Hr'g Tr. vol. 2, 465:15-466:8. He also described Lewis as the "gatekeeper" and the "one that knew and approved everything[.]" *Id*.

Ms. Lewis was similarly described by the District's two witnesses, contracting officer Bruce Witty and former DCRA Deputy Director and Interim Director Carlynn Fuller (Fuller or Interim Director).[11] Witty testified that Lewis was the contracting officer's technical representative. Hr'g Tr. vol. 2, 536:16-537:3. Fuller testified that, "because of the nature of the project and the areas that were being affected by the project, it was Theresa Lewis' project because most of the areas with the exception of one fell under her role as Deputy Director[.]" Hr'g Tr. vol. 2, 536:16-538:22; 592:1-19.

In lieu of the KPMG study, Adsystech was directed by Lewis to work directly with designated DCRA staff to "extract and develop" the requirements of DCRA's system through incremental mapping. Hr'g Tr. vol. 1, 65:5-67:4; 240:20-242:22. The project manager testified that implementation of the Hansen system using the KPMG study would have been inadequate, and that the input of DCRA employee stakeholders was required for "additional extraction work." *Id*. at 228:14. Adsystech testified that mapping DCRA's system in this manner added more work and cost/scheduling changes. *Id*., 67:14-71:1. For example, Adsystech's project manager testified that DCRA stakeholders "had full time job[s] providing and delivering licenses" and were not available to fill in mapping details. Hr'g Tr. vol. 1, 243:1-244:21. The project manager also testified that DCRA stakeholders either did not show up for meetings, or

[10] Roland Gillis testified that he was Adsystech's "chief person, officer over the whole contract[.]" Hr'g Tr. vol. 1, 246:3-9. For ease of reference, Mr. Gillis is referred herein as Adsystech's project manager.

[11] Carlynn Fuller served as DCRA's Interim Director from September 2000 to April 2001. Hr'g Tr. vol. 2, 590:11-591:5. Prior to that, she served a variety of roles at DCRA, including Chief of Staff and Deputy Director for Operations. *Id*. Fuller became involved in the Adsystech contract matter around March 2000 as a result of Adsystech "running out of money." Hr'g Tr. vol. 2, 592:20-593:14.

that the "wrong people" were at meetings. Hr'g Tr. vol. 2, 362:17-363:16. Thus, the project manager testified that Adsystech's work with line staff required "more labor" than anticipated. Hr'g Tr. Vol. 1, 244:7-10; Hr'g Tr. vol. 2, 356:15-19 (the District's failure to deliver to-be processes in an efficient manner caused Adsystech to perform extra work).

By January 2000, Adsystech became aware that its Hansen upgrade contract was running out of funds. Hr'g Tr. vol. 1, 69:2-10; 88:3-89:14; 89:19-90:19. Hr'g Tr. vol. 2, 467:17-469:5. During the course of the contract, Adsystech officials had direct communications regarding the funding shortage with contracting officer Peck, the DCRA Director, Lewis, and Witty (who had been tasked by Peck to address the funding issue). Hr'g Tr. vol. 1, 89:5-92:5; Hr'g Tr. vol. 2, 472:8-473:7. The Adsystech CEO also testified that Adsystech made bi-weekly status reports to DCRA after he alerted them to the concern about the funding shortage. Hr'g Tr. vol. 1, 84:12-85:3; *see also* Appellee's Hr'g Exs. 19-21.

Notwithstanding the funding shortage, Adsystech was requested by various District officials to continue performance because the Hansen upgrade had not been fully implemented as of January 2000. Adsystech's business development director testified that contracting officer Peck and DCRA official Lewis told Adsystech to stay on the job. Hr'g Tr. vol. 2, 482:12-17; 482:22-483:1. Neither Peck nor Lewis testified at the hearing. Adsystech's business development director testified that other District officials requested it to stay on the job as well including, contracting officer Witty, the DCRA Director, its Interim Director, and James Brady (a District official designated as contracting "specialist" before Witty assumed the role of contracting officer). Hr'g Tr. vol. 2, 472:8-473:7; 481:11-484:2.

Other hearing evidence established that several District officials with knowledge of the funding shortage failed to direct Adsystech to stop work. Adsystech's business development director testified that contracting officer Witty knew that Adsystech worked on the DCRA project throughout 2000. Hr'g Tr. vol. 2, 483:6-484:2. Witty himself testified that in "August, September of 2000[,]" contracting officer Peck asked him to "get involved in the [DCRA Hansen] contract to find out where it is going at the time they were running without funds and I was to see what I could do to help out…" Hr'g Tr. vol. 2, 491:16-492:8. Witty testified further that he was aware that Adsystech was "definitely performing work" at DCRA in August 2000[12]. Hr'g Tr. vol. 2, 531:3-18. Nonetheless, Witty testified that he did not issue a stop work order because, I'm not in a position to say absolutely stop work and then have my butt kicked because I stopped something that was in process or ready to go[.]" Hr'g Tr. vol. 2, 527:9-528:4. Witty testified further that, "[t]here are ways, at that time especially, to do a ratification to cover that, so I didn't want to be the person to stop it at that point[.]" *Id*.; 528:5-8.

Adsystech's project manager also testified that Lewis never instructed Adsystech to stop work because the contract funds were exhausted. Hr'g Tr. vol. 1, 265:9-20.[13] Further, DCRA's Interim Director conceded that she too "never told them to stop working" although she knew

[12] Witty acknowledges that he worked on two Adsystech contracts during this period but his testimony is clear that he was aware of the instant contract during the August 2000 period. *Id*.

[13] In fact, the Adsystech project manager testified that no District official ever advised Adsystech to stop contract performance, including Lewis, contract officers Peck and Witty, Office of Contracting and Procurement contracting specialist James Brady, and DCRA senior official Carlynn Fuller. Hr'g Tr. vol. 1, 265:9-20.

Adsystech employees were working on site at DCRA. Hr'g Tr. vol. 2, 612:1-614:3.[14]

In addition to the record showing that various District officials requested Adsystech to continue performance (and/or failed to direct Adsystech to stop performance), the record also shows that contracting officer Peck, contracting officer Witty, Lewis, and the DCRA Director promised Adsystech *payment* for work undertaken after contract funds were exhausted. For example, the Adsytech CEO testified that Peck stated that she would request that Witty resolve the funding issue. Hr'g Tr. vol. 1, 98:18-102:4. Although uncertain of the date that Peck made the above representation, Adsystech's CEO testified that he believed it was before the April 2001 stop work order was issued.[15] *Id.* The record also indicates that Witty informed Adsystech in an October 2000 email that "I am working on your back payment issues and expect the process to take to [m]id November to find and obligate the funds. Payment is likely to be made no sooner than January even if I pushed hard." Appellant's Hr'g Ex. 14.

Adsystech's project manager also testified that he was in attendance at meetings with Lewis where she assured Adsystech of payment. Hr'g Tr. vol. 1, 260:1-18; 263:3-8. The District's witnesses did not contradict this statement. Rather, the Interim DCRA Director testified that she attended a March 2, 2000, meeting with Adsystech, Lewis and others. When asked whether "anyone, yourself or Theresa Lewis, or anyone else" [at the meeting] promised to secure additional money for Adsystech, the Interim Director testified only that "I know I didn't[.]" Hr'g Tr. vol. 2, 593:15-597:10. Her testimony was silent as to any payment representations that Lewis may have made.

Further, the DCRA Director met with Adsystech representatives in or around July 2000. In a September 13, 2000, follow up letter, the Director wrote:

> "[b]y this letter, I am authorizing payment once we receive and accepted [*sic*] these deliverables, and have been provided with a demonstration [of] the system designed for the Office of Adjudication, as well as any additional deliverables discussed during [our]meeting."

Appellee's Hr'g Ex. 7; Hr'g Tr. vol. 1, 161:14-163:14.

In addition to the inadequacy of the KPMG study, there were two other factors leading to Adsystech's performance of additional contract work herein: problems with final data conversion, and the development of DCRA's Master Business License (MBL) permit, and problems encountered with final data conversion. As regards the MBL development, Adsystech's scope enlarged significantly during the contract due to Theresa Lewis' request that it develop a MBL as part of the upgrade. A MBL is a license that replaces a merchant's obligation to apply separately for multiple licenses, with a simplified process whereby a single

[14] The former official testified, however, that her understanding was that Adsystech was "finishing up the contract" and not doing any "new work." Hr'g Tr. vol. 2, 612:1-614:3. We do not see the significance in the distinction for purposes of determining whether District contract officials authorized (directly or through ratification) Adsystech to continue performance after contract funds had been exhausted. Neither party contends herein that work performed by Adsystech after exhaustion of contract funds was for "new work" unrelated to the parties' June 18 and October 25 contracts.

[15] The stop work order issued herein is discussed *infra* at pp. 7-8.

license is issued authorizing all of a merchant's regulated activity. Hr'g Tr. vol. 1, 266:10-267:18. The MBL was not originally a part of the parties' contract scope. Hr'g Tr. vol. 1, 209:15-210:18; 236:17-238:9. Their original scope called for separately-issued multiple business licenses. *Id*. But Theresa Lewis learned about the MBL concept during a visit to Washington state, and "thought it could work in the District[.]" Hr'g Tr. vol. 2, 664:16-665:21. There was no written guidance to Adsystech, however, as to development of the MBL because the KPMG study did not address it, and much of the concept was "in [Lewis'] head." Hr'g Tr. vol. 1, 234:4-238:9; 309:21-310:21.

Lewis assigned a key person to provide Adsystech with DCRA's business logic, and in reliance thereon, Adsystech spent "numerous hours and weeks" developing a MBL that met with the assigned staffer's approval. Hr'g Tr. vol. 1, 249:5-21. When presented with Adsystech's initial MBL, however, Lewis rejected it stating that her staff had provided Adsystech with the wrong requirements. *Id*. 249:5-250:4. As a result, Adsystech informed Lewis that the changes would require additional work, and add to the cost. *Id*. 250:18-22. Ultimately, Adsystech put in the additional work to create an acceptable MBL which was used by Lewis in a demonstration for businesses of how the new licensing process would work. *See* Appellant's Supp. Ex. 38; *see also* Hr'g Tr. vol. 1, 270:7-272:19; vol. 2, 384:10-385:8.

With respect to final data conversion, Adsystech performed additional work because of DCRA's inability to provide the final data required for conversion. Adsystech testified that data conversion consisted largely of three steps: (1) selection of data to migrate, (2) Adsystech's development of the "tool" to take data from the old system to the Hansen system, and (3) the user-community's clean-up of the migrated data afterward. Hr'g Tr. vol. 2, 365:12- 368:14. Adsystech testified that DCRA staff failed to and/or were untimely delivering data from its various databases to Adsystech for ultimate conversion to the Hansen system. Hr'g Tr. vol. 1, 244:11-21. As a result, Adsystech testified that it ended up "putting development staff on there to actually get certain information that they were supposed to provide themselves, the [DCRA] IT staff[.]" Hr'g Tr. vol. 2, 368:16-369:5. Consequently, Adsystech testified that it performed more work on data conversion than intended under the parties' contract. Hr'g Tr. vol. 2, 368:15-369:16.

In total, Adsystech continued to perform services and bill therefore for 13 months following the point at which the parties were aware that contract funds were exhausted. During the 13 month period in question, Adsystech submitted 9 invoices to the appellee totaling $713,305. Adsystech's invoices were submitted at the approximate rate of one per month.[16]

The District issued a Stop Work Order (SWO) on April 3, 2001. Appellant's Hr'g Ex. 11. The SWO was issued by contracting officer Witty who testified that he issued the order because he "was told by [DCRA's IT official], the day before, that he would like to have the stop order[.]" Hr'g Tr. vol. 2, 509:15-510:4. Witty testified that he didn't think the DCRA IT person gave a reason. *Id*. 510:7-11. Witty went on to testify that his personal belief was that the order came about because a newly-hired OCTO consultant[17] wanted Adsystech's contract stopped

[16] Appellant submitted one invoice on June 2, 2000, covering the four month period February 1, 2000, to May 31, 2000. Thereafter appellant submitted one invoice per month until April 12, 2001. Hr'g Supp. Ex. 36a.

[17] The newly-hired official was "Kim Henderson." Witty testified that "if [he] had to guess", Kim Henderson joined

because of a funding shortage, and Adsystech's purported use of "triggers" instead of the Hansen system.[18] Hr'g Tr. vol. 2, 510:12-516:3.

The District's stated reason for issuing the SWO, however, was very different. An email sent by Witty to the Adsystech CEO approximately one month after the District issued the SWO, indicates that it was issued due to allegations that the District did not receive services they paid for and, therefore, was conducting "a routine review of all deliverables under the contract[.]"[19] The email also noted that the SWO would be released "[i]f the review finds nothing." Appellant's Hr'g Ex. 13.

At the time that the SWO was issued, Adsystech testified that the Hansen system had not gone "live" in any of the DCRA administrations,[20] but that Adsystech had completed its contractual performance and was awaiting DCRA's clean up of data redundancies so that Adsystech could do a final data conversion and go live. *See* Hr'g Tr. vol. 1, 266:4-266:9; Hr'g Tr. vol. 2, 351:16-353:2; Hr'g Tr. vol. 2, 354:3-21; Hr'g Tr. vol. 2, 369:17-370:18; Hr'g Tr. vol. 2, 383:7-22; 389:4-8; Hr'g Tr. vol. 2, 391:20-392:7.[21]

Evidence adduced at the hearing regarding the status of Adsystech's contract completion at the time of the SWO included (1) very detailed testimony by Adsystech's project manager regarding its contract performance, and (2) three contemporaneous written documents prepared between January 3, 2001, and April 6, 2001 (two prepared by Adsystech and the third by a District consultant). We briefly summarize the evidence below.

Adsystech's project manager provided very detailed testimony during which he concluded that each of the 10 tasks outlined in the parties' agreed upon statement of work was completed. He also testified that the District did not reject any Adsystech deliverables required by the contract. Hr'g Tr. vol. 2, 353:21-354:2. His testimony was not contradicted by the District's two witnesses, neither of whom appeared to be familiar with the technical nature of the contract's performance requirements, nor engaged in contract oversight or administration.[22]

The Adsystech project manager's testimony regarding its completion of each contract task can be summarized as follows:

OCTO in January 2001 (or later) and that the DCRA contract was one of his projects. Hr'g Tr. vol. 2, 513:1-515:19.

[18] Triggers are programming code that directs the system to automatically take data entered on one screen, and store or enter it elsewhere in the system. Hr'g Tr. vol. 1, 297:4-17.

[19] Mr. Witty also stated that, "[t]here are allegations that [the District has] not received all of the deliverables under the contract." Appellant's Hr'g Ex. 13.

[20] He testified that the MBL was "on the verge of going live" and was so close to going "live" that Ms. Lewis "had a public showing with businesses…[on] how it was going to change and … benefit" them, and that "[Adsystech had] already loaded it in the production one stop environment for them to showcase it[.]" Hr'g Tr. vol. 2, 384:10-385:8. He also testified that some processes in BRA were live, and that Hansen was "at some level of operation" at BLRA. Hr'g Tr. vol. 2, 384:10-390:4.

[21] Adsystech's project manager also testified that it had not completed integration of the Hansen system into the District's larger citywide Call Center program at the time of the SWO. Hr'g Tr. vol. 2, 370:19-372:15. We discuss this issue under "Task 9" *infra* at p. 10.

[22] Witty did not appear to understand the technical nature of the services provided under the contract. *See, e.g.*, Hr'g Tr. vol. 2, 513:20-514:21. Similarly, Fuller's lack of technical depth is noted herein at pp. 12-13.

TASK 1 is identified as "Project Kick-off," which is defined as a meeting between Adsystech and DCRA management and other key staff. Appellee's Hr'g Ex. 3, p.2. The project manager testified that the meeting was held in July 1999. Hr'g Tr. vol. 2, 313:12-17.

TASK 2 is identified as "Project Implementation Plan," which Adsystech's project manager testified was delivered to DCRA on or before December 9, 1999. Appellee's Hr'g Ex. 3, p.2. Hr'g Tr. vol. 2, 322:7-323:1. Additionally, contracting officer Peck corroborated Adsystech's completion of the plan in her October 25, 1999, "Council Contract Summary," transmitting the October 25 contract to the Council of the District of Columbia for review. Appellee's Hr'g Ex. 5.

TASK 3 is identified as "Implementation Priorities" for the Hansen upgrade, which the project manager testified was completed when Adsystech submitted the project plan to DCRA (i.e., on or before December 9, 1999). Appellee's Hr'g Ex. 3, p.2. Hr'g Tr. vol. 2, 327:7-8; 331:10-22. The project manager testified that BLRA/Group 1 was prioritized. *Id*. 327:7-329:3. He testified further that this task involved identification of over 300 new tables that Adsystech needed to build in furtherance of the upgrade. [23] *Id*. 329:4-330:9.

TASK 4 is identified as "Software and Training," which included software licenses, a maintenance contract for 150 concurrent users, installation rights, a training plan, training, and a user acceptance test. Appellee's Hr'g Ex. 3, p.3. The project manager testified that the training plan and training deliverable were provided. Hr'g Tr. vol. 2, 346:5-7; 347:3-348:15. He also testified that the required software, licenses and maintenance plan were acquired per the statement of work. Hr'g Tr. vol. 2, 319:4-320:18. Finally, he testified that all of the user tests were completed. *Id*. 372:16-373:22.

TASK 5 is identified as "Develop System Implementation Specifications," which the project manager testified meant creation of the tables, databases, screens, work flow processes, and reports (i.e., permits) printed out by the system. Appellee's Hr'g Ex. 3, p.4; Hr'g Tr. vol. 2, 348:16-349:16. More specifically, the project manager testified that its deliverable was to provide a template by which DCRA could print the various licenses, permits, vouchers, etc. that it issued. *Id*. 349:17-352:14. The project manager testified that Adsystech delivered templates for all of the required processes. Hr'g Tr. vol. 2, 352:16-353:2.

TASK 6 is identified as "Review and Validate Process Flows," which the record indicated was not an Adsytech task, but rather a DCRA one. Appellee's Hr'g Ex. 3, p.4 ("DCRA will deliver documentation and process flows of "as is" processes to the Contractor…"); *see also* Hr'g Tr. vol. 2, 355:4-17. The project

[23] A table is akin to a spreadsheet that stores user data entered at a particular screen. Hr'g Tr. vol. 1, 297:18-298:20.

manager testified that the KPMG study was a part of this task, but that certain "content," "fields" and "business logic" information had to be gotten from the [DCRA] focus group members[.]" Hr'g Tr. vol. 2, 355:22-356:14. The project manager testified that DCRA failed to complete Task 6 in an efficient manner. *Id*. 356:15-19.

TASK 7 is identified as "Implementation Processes," which the record indicates, and the Adsystech project manager testified, meant selecting the 11 core processes that were to be implemented under the June 18 contract. Appellee's Hr'g Ex. 3, p.5; Hr'g Tr. vol. 2, 356:20-358:10.

TASK 8 is identified as "Data Conversion," which the record indicates and the project manager testified, meant delivery of a data conversion standards document to DCRA, Appellee's Hr'g Ex. 3, p.5, Hr'g Tr. vol. 2, 363:17-364:5, analysis of existing raw data for the purposes of determining whether DCRA wanted to migrate it to the new system, *id*. 366:2-10, writing "the tool" to migrate data from the old to the new system, *id*. 366:21-367:9, and data clean-up (removal of duplicates, identification of missing information, etc.). *Id*. 366:11-20. The project manager testified that Adsystech provided the conversion document to DCRA, *id*. 363:17-364:5, and completed the data conversion, except for master license duplicates as to which DCRA was responsible. *Id*. 367:10-368:14; 369:17-370:18. The project manager went on to testify that Adsystech performed more work under Task 8 than contemplated under the original contract. *Id*. 368:15-369:10. He testified that this work included the assignment of Adsystech "development staff" to work on "get[ting] certain information that they [DCRA] were supposed to provide themselves[.]" *Id*.

TASK 9 is identified as "System Interfaces and Integration," which the record indicates and the Adsystech project manager testified, meant building interfaces between the Hansen system and other District systems, including, but not limited to, the citywide Call Center and the Rapid System (a remote device for inspector data-entry). Appellee's Hr'g Ex. 3, p.6; Hr'g Tr. vol. 2, 370:19-371:18. The project manager testified that Adsystech did not complete the Call Center interface, and that he did not remember if it completed the Rapid System one. *Id.* 371:19-372:15. He testified that a meeting with Theresa Lewis to discuss the interface did not result in any decisions, and that the interface task remained unresolved at the time of the SWO. *Id*. 371:19-372:15.

TASK 10 is identified as "Customized Training Guide." Appellee's Hr'g Ex. 3, p.6. Adsystech did not provide testimony indicating whether it completed this task, nor did it submit a copy of the guide as an exhibit into our record.

In addition to the project manager's testimony regarding task completion, the record includes an email sent by Adsystech's project manager to a District official on January 10, 2001, that references an attached Adsystech report addressing the creation of an interface between the

Hansen system and a web portal under consideration.[24] Appellant's Hr'g Ex. 49. During this period, DCRA realized that it could not manually process all of the expected master business license renewals, and sought to work with Adsystech to "create a self-help web interface portal where people could go online …and they could then self-create their…license and pay for it[.]" Hr'g Tr. vol. 1, 272:20-274:5. The significance of the attachment is that it purports to summarize work *already* completed by Adsystech as of January 3, 2001 (the date on the report).[25]

Adsystech's project manager testified that the report documented the methodology by which Adsystech completed the Hansen implementation, provided a description of the completed system, and listed an inventory matrix itemizing the "sheer volume of work that [Adsystech] had to do to implement the full solution that was currently in use within DCRA[.]" Hr'g Tr. vol. 1, 284:17-299:14. The document itself portrays the Hansen implementation as having been completed, and includes a narrative that summarizes numerous components of the completed system (e.g., an Oracle Enterprise Server 8.0.3 relational database, over 1,400 tables (including 400 custom tables to support DCRA's unique business processes), over 300 triggers and stored procedures, and, functions to organize/schedule inspections and calculate fees based on application type). Appellant's Hr'g Ex. 49. In short, Exhibit 49 portrays Adsystech's performance as being complete or nearly complete as of January 3, 2001.[26]

Further, a second Adsystech contemporaneous document, dated February 8, 2001, also shows that Adsystech's performance was complete or substantially complete as of its date. Appellant's Hr'g Ex. 31. The document is a de facto punch list, and appellant's project manager testified that he and Theresa Lewis agreed that the schedule of items in the document reflected their final list of contract items requiring completion. Hr'g Tr. vol. 2, 379:2-380:22. The project manager also testified that DCRA was presented with the document one month before it issued the SWO. Hr'g Tr. vol. 1, 268:5-269:1. The document lists three categories of remaining work items as of February 8, 2001. Appellant's Hr'g Ex. 31. The Adsystech project manager provided the following testimony regarding Adsystech's eventual completion of these items:

> Master License Deployment Schedule: The project manager testified that it completed most tasks required for the final data conversion of the Master Business License, including "providing the document, providing the mapping, actually writing the code that had to do the actual conversion process[,]" but never received

[24] Adsystech was asked by OCTO Deputy Director Jack Pond to become involved in connecting the Hansen system to the DCRA website and, by January 2001, Adsystech was "heavily engaged" in the project. *Id*. According to Adsystech's project manager, the project eventually "subsided" and "everything stopped." Hr'g Tr. vol. 1, 290:1-17.

[25] The report is titled, "Technical Overview For Department of Consumer and Regulatory Affairs eBusiness Center Interface to the DCRA Permits and Licensing Hansen Enterprise Solution[.]" Appellant's Hr'g Ex. 49.

[26] The District did not challenge the accuracy of the report on cross-examination. Additionally, its witnesses did not challenge the accuracy of the Adsystech report in the District's case-in-chief. Finally, the District's post-hearing brief does not specifically challenge the accuracy of the report. At the hearing, however, the District objected to introduction of Appellant's Hr'g Ex. 49 because it was not produced during discovery. Hr'g Tr. vol. 2, 278:17-280:22. The Presiding Judge agreed to allow questioning on Ex. 49, but ruled that the decision on its admissibility would be determined later. *Id*. The record is unclear as to whether the Presiding Judge eventually allowed Ex. 49 into evidence.

DCRA's final version of the data needed to go into final production. Hr'g Tr. vol. 2, 381:1-383:15. The project manager testified that if the DCRA data had been delivered timely, Adsystech could have gone into final production on March 6, 2001. Hr'g Tr. vol. 2, 383:16-384:9. Nonetheless, the project manager testified that Adsystech provided DCRA with a system that produced master licenses. Hr'g Tr. vol. 1, 270:7-272:19. The appellant also provided an example of a completed MBL for our record. Appellant's Hr'g Ex. 38a.

OAD Deployment Schedule: The project manager testified that "there were no issues with closing out OAD. It was minor things[.]" Hr'g Tr. vol. 2, 387:2-389:3. As a whole, the project manager appeared to have very little recollection as to whether it completed OAD's Hansen implementation punch list. *Id.*

6 Remaining Adsystech Work Items: The project manager testified that one outstanding item was creation of a "flag" notifying the Office of Tax and Revenue of certain tax information before issuance of a license. Hr'g Tr. vol. 2, 390:5-22. The project manager testified that it was completed. *Id.* 391:5-13. A second outstanding item pertained to corporations, which the project manager also testified was done. *Id.* 391:14-19. A third outstanding item was described as matching addresses in DCRA's legacy database to business licenses in the Hansen system. *Id.* 391:20-393:19. The project manager testified that the conversion of the legacy database addresses to Hansen never occurred because DCRA was "not capable of doing" it. *Id.* A fourth outstanding item was Adsystech's receipt of final DCRA feedback on the MBL templates that appellant developed. *Id.* 394:13-396:16. The project manager testified that it received final feedback from Theresa Lewis on MBL templates. *Id.* 395:12-396:16. A fifth remaining work item entailed revisions Adsystech was supposed to make to DCRA's renewal bill report. *Id.* 396:17-398:5. However, the project manager testified that DCRA needed to provide Adsystech with data, and then Adsystech would make the final revisions. *Id.* The project manager testified that he could not remember if the fifth item was finalized. *Id.* A sixth remaining Adsystech work item was data clean-up. Hr'g Tr. vol. 1, 268:5-270:6. The project manager testified that data conversion was complete by this time (i.e., February 8, 2001) because data clean up would only occur after conversion. *Id.* He also testified that DCRA was given two weeks to review data in the Hansen system, and then tell Adsystech "what to clean up." *Id.* Adsystech helped DCRA identify problems by providing them with "statistics[,]" "the types of problems[,]" and the "total numbers" of problems.

Hr'g Tr. vol. 2, 398:6-400:13.

At the hearing, the District attempted to use the former DCRA Interim Director as a witness to dispute Adsystech's evidence regarding contract completion. In this regard, the District sought to have the Interim Director validate statements made in an independent consultant's two written reports that were critical of Adsystech's performance. Neither the author of the reports, nor the District officials to whom they were submitted, testified at the hearing.[27] The Interim Director, however, did not appear to have sufficient personal knowledge of Adsystech's performance, nor the technical mastery of the reports' subject matter to discredit Adsystech's performance.

Specifically, the Interim Director testified that "at some point" there were user complaints about the Adsystech system "not doing what they thought … it should do", Hr'g Tr. vol. 2, 626:20-629:17, and that DCRA then retained Hansen Information Technologies (the consultant) to "find out does [Adsystech's Hansen implementation] do what it is supposed to do[.]" *Id*. This development led to the consultant's issuance of two critical reports on Adsystech's implementation, and the consultant's correction of the purported deficiencies. The consultant was paid $73,020 to correct 81 purported deficiencies noted in its first report dated April 6, 2001. Appellee's Hr'g Ex. 10; Hr'g Tr. vol. 2, 632:8-635:5.[28] The consultant was paid an additional $259,692 to correct 44 problems identified in a second report dated April 30, 2001. Appellee's Hr'g Ex. 69; Hr'g Tr. vol. 2, 631:10-632:4; 648:1-18; Appellee's Hr'g Ex. 73.

However, the Interim Director did not appear knowledgeable regarding the deficiencies noted in the first or second report. For example, the Interim Director testified that she didn't know whether the consultant did any of the initial work (i.e., relating to the 81 identified first set of problems) because, "I don't have the technical knowledge to go through each of these to say what was work and what was just an assessment[.]" Hr'g Tr. vol. 2, 648:19-649:7. On cross-examination the former Interim Director testified that she was not DCRA's technical person, and conceded that the services performed by the consultant pursuant to the second contract may have been beyond the scope of Adsystech's contract. Hr'g Tr. vol. 2, 653:6-654:16. Her latter testimony appears consistent with that of Adsystech's project manager, whose testimony noted that the consultant's criticism of Adsystech pertained to DCRA's upgrade from Hansen Version 7.0 to Version 7.5, which exceeded Adsystech's contractual obligation to implement Version 7.0. Hr'g Tr. vol. 2, 429:11-430:12. The parties' June 18 statement of work specified an upgrade to Hansen Version 7.0. Appellee's Hr'g Ex. 3.

In contrast to the former Interim Director's testimony, the Adsystech project manager provided an item-by-item response to the 81 purported deficiencies noted in the consultant's first report. Hr'g Tr. vol. 2, 375:10-431:13. The essence of the project manager's testimony was that the consultant's noted deficiencies were either things Adsystech was not tasked to do (contract "enhancements" requiring a modification, items not on the parties agreed-to punch list, etc.), or

[27] The first report was signed by the consultant's Chief Operating Officer "Kent Johnson," based on analyses performed by employees "Keith Hobday" and "Terry Dunn." Appellee's Hr'g Ex. 10. It was addressed to "Kim Henderson," an OCTO contractor dispatched to DCRA for help on some of its problems. Hr'g Tr. vol. 2, 628:17-629:2; 649:21-650:19. Neither Johnson, Hobday, Dunn nor Henderson testified at the hearing.

[28] The purchase requisition is signed by the Interim Director on April 17, 2001, and by the contracting officer (name unclear) on April 18, 2001. Appellee's Hr'g Ex. 68.

minor issues like training. *Id*. Moreover, the Board notes that none of the 81 purported deficiencies appear on the parties' February 8, 2001, punch list. Appellant's Hr'g Ex. 31 (discussed infra at pp. 11-12). Finally, the Board notes that the consultant's April 6 report corroborates Adsystech's contention that there were considerable data redundancy problems in DCRA's database. *See, e.g*., Hr'g Tr. vol. 2, 425:13-18; 428:11-16 (noting that the consultant's report mentions the same data redundancies at items H.2, H.4, and H.12 that Adsystech complained of in its communications with DCRA).

The SWO was never released, nor did Adsystech ever receive a cure notice, termination letter, or similar notification from the District. Hr'g Tr.vol. 1, 133:19-135:10. Adsystech's instant claim is for the $44,165 balance remaining on its June 18, 1999, contract, and the $713,305 in nine unpaid invoices under its October 25, 1999, contract. Therefore, in all, appellant seeks an equitable adjustment in the amount of $757,470 under the theory of constructive change (implied ratification). Alternatively, the appellant seeks recovery under the theories of promissory estoppel and quantum meruit.

Conversely, the appellee contends that the Anti-Deficiency Act bars payment because Adsystech's billings exceed the contract ceiling price, and/or that the parties' agreement to continue services after funds exhaustion embodies an impermissible oral agreement. Appellee's Post Hr'g Br. 11-14. The appellee also denies that District contracting officials ratified Adsystech's provision of services, asserting that ratification is valid only when it follows the "official ratification procedure" set forth in former D.C. Code § 2-301.05(d)(5) and the District's *Procurement Policy and Procedure Directive No. 1800.00* (each discussed below). *Id*. 14-20. Finally, the District contends that the Board lacks jurisdiction over quantum meruit claims, that equitable estoppel does not apply because its agents were not authorized to enter a contract with Adsystech, and that equitable adjustment cannot be invoked to authorize a payment that exceeds a District purchase order. *Id*. 20-26.

DISCUSSION

We exercise jurisdiction over this matter pursuant to D.C. Code §2-360.03(a)(2) (2011).[29] The Board's jurisdiction herein is not disputed by the appellee. Appellant submitted claims to contracting officer "James Brady" pertaining to the above on December 9, 2002. AF Ex. 18. In a letter dated December 20, 2002, Brady informed the appellant that "Bruce Witty is the correct Contracting Officer[,]" and that the claim would be forwarded to Witty. *Id*. Our record does not indicate when, or whether, Brady forwarded appellant's claims to Witty. No decision was ever forthcoming from Witty. As a result, the appellant filed its Notice of Appeal with the Board on June 20, 2003, noting that its claim had been "pending, without decision…since late December 2002[.]" AF, Notice of Appeal, June 20, 2002. Under these circumstances, we conclude that the Board's jurisdictional prerequisites have been met in this case.

The recitation of facts stated in the background, discussion, and conclusion sections constitute the Board's findings of fact in accord with D.C. Mun. Regs. tit. 27, § 214.2 (2002). Additionally, rulings on questions of law, and mixed questions of fact and law are set forth throughout our decision.

[29] Prior to April 8, 2011, the Board exercised jurisdiction pursuant to D.C. Code § 2-309.03(a)(2)(2001).

There are four issues presented in this case. The first issue is whether the appellant is entitled to an equitable adjustment under the theory of constructive changes. The second issue is whether Adsystech performed its contractual obligations herein. The third issue is whether the Anti-Deficiency Act bars appellant's recovery. Finally, the fourth issue is whether appellee's oral requests that Adsystech continue performance on the instant contract after the depletion of contract funds constitutes an impermissible oral contract.

Based upon our review of the record, we conclude that Adsystech is entitled to an equitable adjustment for constructive changes ordered and/or ratified by District contracting officials. We also conclude that Adsystech completed its contractual obligation to implement DCRA's Hansen upgrade. Further, we conclude that the Anti-Deficiency Act does not apply instantly, and thus is not a bar to appellant's recovery. Finally, we conclude that former D.C. Code §§ 2-301.05(d)(5) (ratification procedures) and 2-301.05(d)(3) (barring oral contracts) do not apply instantly. We remand this matter to the appellee for a determination of quantum. The parties shall notify the Board within 30 days of the status of negotiations. We address the merits issues below.

Appellant Is Entitled To An Equitable Adjustment Due To Constructive Changes

An equitable adjustment is "simply [a] corrective measure utilized to keep a contractor whole when the Government modifies a contract[.]" *Appeal of Grunley Const., Inc.,* CAB No. D-910, 41 D.C. Reg. 3622, 3638 (Sept. 14, 1993)(citing *Construction Corporation v. United States*, 163 Ct. Cl. 97 (1963)). In order to establish eligibility for an adjustment based on a constructive change, a contractor must demonstrate the occurrence of two events: a bona fide "change" and the issuance of an "order." *D.C. v. Org. for Envtl. Growth* , 700 A.2d 185, 203 (D.C. 1997) *rev'd on other grounds sub nom, Abadie v. Org. for Envtl. Growth,* 806 A.2d 1225 (D.C. 2002); *Appeal of Technical Construction, Inc.*, CAB No. D-730, 36 D.C. Reg. 4067, 4085 (Mar. 14, 1989). A "change" is established when the actual performance goes beyond the minimum standards required by the contract. *Org. for Envtl. Growth* at 203. An "order" can be shown whenever a government representative, by words or deeds that go beyond mere advice, comment, suggestion, or opinion, requires the contractor to perform work which is not a necessary part of the contract. *Id.*

In the instant case, Adsystech has established both the "change" and "order" elements required to warrant an equitable adjustment. With respect to contract changes, the record shows that Adsystech's actual performance went beyond the contract's minimum standards in four ways. First, District contracting officials directed Adsystech to continue contract performance beyond the point at which contract funds became depleted. This was done to secure Adsystech's performance in *completing* "to be" systems mapping, MBL development, and final data conversion. Thus, contracting officers Peck and Witty directed Adsystech to finish the Hansen upgrade. Peck directed Adsystech to continue performance through a direct request. Witty, through his failure to *stop* Adsystech's performance, also "directed" Adsystech to continue performance. The evidence shows that Peck told Adsystech directly to stay on the job. Hr'g Tr. vol. 2, 482:12-17; 482:22-483:1. The evidence also shows that Witty knew as early as "August, September of 2000" that lapsed contract funds were an issue and that Adsystech was "definitely"

still performing, yet he did not order them to stop performance. Hr'g Tr. vol. 2, 531:3-18; 527:9-528:4.

Second, Adsystech performed additional contract work prompted by the inadequacy of KPMG's study of DCRA's "to be" processes. Hr'g Tr. vol. 2, 355:4-356:19. In this regard, TASK 6 of the contract required DCRA to "deliver documentation and process flows of as is processes" to Adsystech. Appellee's Hr'g Ex. 3, 4; *see also* Hr'g Tr. vol. 2, 355:4-17. As we noted, deficiencies in the KPMG study caused Adsystech to work directly with designated DCRA staff to "extract and develop" system requirements through incremental mapping. Hr'g Tr. vol. 1, 65:5-67:4; 240:20-242:22. This was a lengthy and tedious process, with dysfunctional meetings and reluctant DCRA stakeholders. Hr'g Tr. vol. 1, 243:1-244:21; Hr'g Tr. vol. 1, 243:1-244:21. Moreover, this incremental approach to mapping DCRA's system requirements resulted in additional work, as well as changes to contract cost and scheduling. Hr'g Tr. vol. 1, 67:14-71:1.

Third, Adsystech performed additional work prompted by DCRA's request for development of a MBL, and the multiple and differing requirements communicated to Adsystech regarding MBL development. In this regard, we noted that the MBL was not originally part of the parties' contract scope. Appellee's Hr'g Ex. 3, p.4; Hr'g Tr. vol. 1, 209:15-210:18; 236:17-238:9. The MBL concept "started out in Lewis' head," and was developed largely from scratch because the KPMG study was not useful guidance for developing MBL requirements. Hr'g Tr. vol. 1, 234:4-238:9; 309:21-310:21. Although TASK 5 of the parties' contract called for the development of licenses, termed "reports" in the statement of work, there is no mention of a MBL, nor of a "report" with the functionality of the MBL. Appellee's Hr'g Ex. 3, p.4; Hr'g Tr. vol. 2, 348:16-349:16. That notwithstanding, Adsystech eventually spent "numerous hours and weeks" developing a MBL according to requirements provided by DCRA staff, Hr'g Tr. vol. 1, 249:5-21, only to have Lewis reject its work because she disagreed with how DCRA staff identified MBL requirements. *Id*. 249:5-250:4. This led to even more MBL development work and the additional costs associated therewith. *Id*. 250:18-22.

Finally, Adsystech performed additional work helping DCRA complete internal data conversion. In this regard, TASK 8 of the parties' contract required, *inter alia*, Adsystech to deliver a Data Conversion Standards Document to DCRA, Appellee's Hr'g Ex. 3, 5; Hr'g Tr. vol. 2, 363:17-364:5, analyze raw data with DCRA for the purpose of allowing DCRA to determine the data to be migrated to the new system, *id*. 366:2-10, and perform data clean-up (removal of duplicates, identification of missing information, etc.). *Id*. 366:11-20. While Adsystech provided the conversion document to DCRA, *id*. 363:17-364:5, DCRA failed to complete data clean-up for the MBL. *Id*. 367:10-368:14; 369:17-370:18. DCRA staff also failed and/or were untimely delivering data from its various databases to Adsystech for ultimate conversion to the Hansen system. Hr'g Tr. vol. 1, 244:11-21. This required Adsystech to assume more work under Task 8 than was contemplated under the original contract. *Id*. 368:15-369:10. This additional work included the assignment of Adsystech "development staff" to work on "get[ting] certain information that they [DCRA] were supposed to provide themselves[.]" *Id*. It also included Adsystech's development of "routines" to assist DCRA with identifying bad and duplicative data. *See* Hr'g Tr. vol. 2, 367:10-368:14.

With respect to the "order" element required for an equitable pricing adjustment, the record shows that District contracting officials Peck and Witty directed Adsystech to "stay on the job" to complete DCRA's upgrade. The officials' request that Adsystech remain on the job necessarily implied that Adsystech was directed by them to "finish" incomplete tasks, i.e., "to be" systems mapping, MBL development, and final data conversion. Thus, we conclude that authorized District officials ordered Adsystech to "stay on the job" to finish DCRA's upgrade, and directed them to perform the additional work under Tasks 5, 6 and 8 as noted above.

The District's manner of "ordering" these changes included contracting officer Peck's direct request that Adsystech stay on the job, contracting officer Witty's conduct consistent with a request that Adsystech continue performance, and Peck and Witty's ratification of requests made by DCRA's former Director and Lewis (the COTR) that Adsystech continue performance. As regards the contracting officer Peck's direct request that Adsystech continue contract performance after funds depletion, she told Adsystech to stay on the job. Hr'g Tr. vol. 2, 482:12-17; 482:22-483:1. Peck was clearly mindful of the funding shortage when she directed Adsystech to continue working. For example, Adsystech's CEO testified that Peck stated that she would request that Witty resolve the funding issue. Hr'g Tr. vol. 1, 98:18-102:4. This was corroborated by Witty himself, who testified that in "August, September of 2000," contracting officer Peck asked him to "get involved in the [DCRA Hansen] contract to find out where it is going at the time they were *running without funds* and I was to see what I could do to help out…" Hr'g Tr. vol. 2, 491:16-492:8 (emphasis added).

In addition to contracting officer Peck's direct request, the *conduct* of contracting officer Witty amounted to an implied order to Adsystech to remain on the job notwithstanding the funding shortage. For example, Witty knew as early as "August, September of 2000" that lapsed contract funds were an issue, and that Adsystech was "definitely" still performing. Hr'g Tr. vol. 2, 531:3-18. Nonetheless, by his own testimony, Witty took no action to stop Adsystech's performance because he did not want to "have my butt kicked because I stopped something that was in process or ready to go[.]" Hr'g Tr. vol. 2, 527:9-528:4.

Witty even took matters a step further. An October 19, 2000, email that he sent to Adsystech's CEO states that, "I am working on your back payment issues and expect the process to take to [m]id November to find and obligate the funds. Payment is likely to be made no sooner than January even if I pushed hard." Appellant's Hr'g Ex. 14. Adsystech's CEO testified that it was "more likely" than not that the October 2000 email referred to the instant contract, as well as a separate Adsystech contract not at issue in this case. Hr'g Tr. vol. 1, 182:17-183:9.[30] Even though Witty never secured Adsystech's payment, it appears that his email amounts to an acknowledgement that the appellee was well aware of, and accepted responsibility for, Adsystech's continued performance.

Finally, the evidence also showed that contracting officials Peck and Witty *ratified* the conduct of DCRA agency representatives Theresa Lewis and the DCRA Director, both of whom

[30] Witty's testimony that he did not learn about Adsystech's funding problem on the instant contract until after the stop work order is not convincing. *See* Hr'g Tr. vol. 2, 579:3-580:11; see also Appellee's Hr'g Ex. 13. There are too many instances in the record where Witty's testimony plainly contradicts such an assertion. For example, Witty testified that he knew about the funding problem in "August, September of 2000[.]" Hr'g Tr. Vol. 2, 491:16-492:8.

requested continuing performance by Adsystech and promised payment therefore. As we have noted, ratification may be found where the ratifying government official has actual or constructive knowledge of a representative's unauthorized act and expressly or impliedly adopts the act. *Appeal of Chief Procurement Officer*, CAB No. D-1182, 50 D.C. Reg. 7465, 7468-7469 (Nov. 29, 2002) (*citing Appeal of W.M. Schlosser*, CAB No. D-903, 42 D.C. Reg. 4824, (Sept. 13, 1994)). Moreover, a contracting official's action to obtain funding for changes ordered by unauthorized representatives constitutes ratification of the unauthorized changes. *Id*. at 7469 (citing *Reliable Disposal Company, Inc.* ASBCA 40100, 91-2 BCA ¶ 23,895 at 119,718). A contracting officer's silence and/or failure to stop contract performance may also constitute ratification. *Id*. In this case, DCRA's then Director and Lewis requested Adsystech to perform additional work, to continue working beyond the funding lapse, and promised them payment therefore. Peck and Witty ratified these agency representatives' conduct.

For example, Adsystech's project manager attended meetings with Ms. Lewis where she assured Adsystech of payment. Hr'g Tr. vol. 1, 260:1-18; 263:3-8. Ms. Lewis told Adsystech's business development director to stay on the job. Hr'g Tr. vol. 2, 482:12-17. Ms. Lewis never informed Adsystech that it should stop work because the contract funds were exhausted. Hr'g Tr. vol. 1, 265:9-20. Similarly, the DCRA Director promised Adsystech payment in the aforementioned September 13, 2000, letter, stating, "By this letter, I am authorizing payment once we receive and accepted [*sic*] these deliverables, and have been provided with a demonstration [of] the system designed for the Office of Adjudication, as well as any additional deliverables discussed during [our] meeting." Appellee's Hr'g Ex. 7; Hr'g Tr. vol. 1, 161:14-163:14. Rather than reject the DCRA representatives' conduct, contracting officers Peck and Witty enabled it. As noted, Peck ratified the DCRA agency representatives' conduct by directing Adsystech to stay on the job, and promising Adsystech payment for its continued services. Hr'g Tr. vol. 2, 482:12-17; 482:22-483:1; 491:16-492:8; Hr'g Tr. vol. 1, 98:18-102:4. Similarly, Witty ratified the DCRA agency representatives' conduct because he was aware of the work progress yet he did not order Adsystech to stop work at any point prior to his April 3, 2001, SWO. Hr'g Tr. vol. 2, 527:9-528:4.

Thus, we conclude that Adsystech has met the requirements for an equitable adjustment due to constructive contract changes. Adsystech has shown that District contract officials changed and/or ratified changes to the parties' contract. Adsystech has also showed that the changes were ordered by authorized District contracting officials.

We reject the District's erroneous argument that lawful ratification did not occur here. The District asserts that ratification would only have been valid if contracting officers Peck and Witty followed the "official ratification procedure" set forth in former D.C. Code § 2.301.05(d)(5) and the District's *Procurement Policy and Procedure Directive No. 1800.00*.[31] In pertinent part, §2-301.05(d)(5) provided:

> (5) The Chief Procurement Officer, or a designee, may authorize payment for supplies or services received without a valid written contract if:
>
> (A) Supplies or services have been provided to and accepted by the District

[31] These provisions were in effect at all times material to the instant dispute.

> government, or the District government otherwise has obtained or will obtain a benefit resulting from provision of supplies or services without a valid written contract;
>
> (B) An agency contracting officer determines that the price for the supplies or services provided without a valid written contract is fair and reasonable;
>
> (C) An agency contracting officer recommends payment for the supplies or services provided without a valid written contract;
>
> (D) The Chief Financial Officer, or a designee, certifies that appropriated funds are available; and
>
> (E) The request for authorization for payment for supplies or services received without a valid written contract is in accordance with any other procedures or limitations prescribed by the Chief Procurement Officer; and
>
> (F) (i) The amount for supplies or services provided to and accepted by the District government does not exceed $100,000; and (ii) If an agency exceeds the specified threshold, the Chief Procurement Officer shall forward the request, by act transmitted by the Mayor, to the Council for review and approval.

Former D.C. Code § 2-301.05(d)(5).

In addition, the appellee argues that the Office of Contracting and Procurement (OCP) issued a Procurement Policy & Procedure Directive for the ratification of unauthorized commitments. AF Ex. 86, *Procurement Policy and Procedure Directive No. 1800.00*. The appellee contends that the directive required that a request for the ratification of an unauthorized commitment be approved by the District's Chief Procurement Officer, Chief Financial Officer, agency head, agency chief contracting officer, and the agency corporation counsel. AF Ex. 86.

Appellee's attempted application of §2-301.05(d)(5) and OCP's internal administrative issuance to the instant matter is erroneous because Peck and Witty, as Chief Technology Officer and contracting chief within the Office of the Chief Technology Officer, respectively, were exempt from the Procurement Practices Act (PPA) as to Year 2000 procurements during the period in question. During the years 1998-1999, nearly all public and private-sector entities were preparing for massive computer system upgrades to prevent disruption anticipated by the onset of calendar year 2000. The Y2K problem, as the crisis came to be known, resulted from the inability of most computers to recognize dates beyond the year 1999.

In the District, computer systems supporting public safety, revenue collection, traffic control, payroll, social welfare benefits, pensions and more were identified as requiring emergency remediation to avoid Y2K service lapses/chaos. Reports issued by the General Accounting Office (GAO) in October 1998 and February 1999 noted that District efforts to become Y2K compliant were "significantly behind" and "far behind." *GAO, Year 2000 Computing Crisis, The District Faces Tremendous Challenges in Ensuring Vital Services Are*

Not Disrupted, Statement of Jack L. Brock, Director, Governmentwide and Defense Information Systems, Oct. 2, 1998; *GAO, Year 2000 Computing Crisis, The District Remains Behind Schedule*, Statement of Jack L. Brock, Director, Governmentwide and Defense Information Systems, February 19, 1999.

In response to the Y2K crisis, the District enacted the "Chief Technology Officer Year 2000 Remediation Procurement Authority Temporary Amendment Act of 1999." D.C. Law 13-17, 46 D.C. Reg. 6314 (July 17, 1999). The Act specifically added new subsection (m) to §320 of the PPA as follows:

> (m)(1) Nothing in this act shall affect the authority of the Office of the Chief Technology Officer to execute Year 2000 remediation contracts. For the purpose of the section, the term "Year 2000 remediation contracts" means procurement for the correction of computers, computer-operated systems, and equipment operated by embedded computer chips, to ensure the proper recognition and processing of dates on or after January 1, 2000.

The new provision was added to the section of the PPA exempting a variety of District agencies from PPA coverage. *See* former D.C. Code §1183.20 (1981).

The instant October 25, 1999, Hansen upgrade contract was specifically noted as a Y2K contract by the Chief Technology Officer in correspondence transmitting the contract to the Council for review. Appellee's Hr'g Ex. 5; *see also* Hr'g Tr. vol. 1, 80:19-83-16. The statement of work for the Hansen upgrade also stated that "the system must be Year 2000 compliant[.]" *See* Appellee's Hr'g Ex. 3, General Requirements, 8. Thus, we conclude that §2-301.05(d)(5) was not applicable to the DCRA Hansen upgrade contract discussed herein, and is not a bar to appellant's entitlement claim.

Adsystech Performed The Change Order Work

The District's post hearing brief does not appear to dispute that Adsystech delivered all deliverables required by the contracts. Appellee's Post Hr'g Br. 2-4, 6-10. The Board concludes that the record shows by a preponderance of the evidence that Adsystech has completed its performance of eight of the 10 tasks identified in the parties' statement of work. Thus, Adsystech has completed Tasks 1-8. *See* discussion infra at pp. 9-10. The record is inconclusive as to whether Adsystech completed Tasks 9-10.

As to the 10 tasks stated in the parties' statement of work, Adsystech's project manager provided detailed testimony noting its completion of eight of the 10 required tasks, which we have summarized infra at pp. 9-10. *See also* Hr'g Tr. vol. 2, 375:10-396:16. The District's witnesses did not discredit Adsystech's testimony regarding completion of tasks, and appeared to lack knowledge regarding the technical nature of contract performance. Hr'g Tr. vol. 2, 513:20-514:13 (Witty); Hr'g Tr. vol. 2, 648:19-649:7; 653:6-654:16 (Fuller). Similarly, Adsystech's witness testified that it completed the six punch list items submitted to the District on February 8, 2001. The District's witnesses have not discredited this testimony either. Adsystech's testimony that it finished tasks herein is corroborated by Appellant's Hr'g Ex. 49, which shows that as of

January 8, 2001, most, if not all, of the Hansen upgrade implementation tasks had been completed. Appellant's Hr'g Ex. 49. There was also testimony that the MBL was used by Lewis in a demonstration for businesses of how the new licensing process would work. Hr'g Tr. vol. 1, 270:7-272:19; vol. 2, 384:10-385:8, and the record included a sample of a completed MBL. Appellant's Hr'g Ex. 38a.

The District's sole witness to testify regarding contract performance, former Interim Director Fuller, testified that she thought Adsystech had completed the Hansen upgrade for most of the Business Land Regulation Administration and the Housing Regulation Administration as early as March 2000. Hr'g Tr. vol. 2, 602:2-603:15. Fuller also testified that she was unsure of how much work Adsystech had completed in the Office of Adjudication division as of March 2000. *Id*. 602:6-609:19. Taken as a whole, the appellant has met its burden regarding substantial completion of tasks required to finalize DCRA's Hansen implementation. Adsystech's evidence includes the detailed testimony of its project manager regarding each task, as well as the project manager's testimony regarding Adsystech's completion of the punch list items remaining as of February 8, 2001. *See* discussion *infra* at pp. 11-12. *See also* Appellant's Hr'g Ex. 31. We conclude that Adsystech has met its burden regarding substantial completion of performance herein.

The Anti-Deficiency Act Does Not Bar Appellant's Recovery

The District argues that the Anti-Deficiency Act, 31 U.S.C. § 1341, bars recovery herein because once the "depletion of the funds encumbered by the [October 25] Purchase Order" occurred, there was no valid written agreement between the parties. Appellee's Post Hr'g Br. 11-12. In other words, the District contends that once contract funds were depleted, any agreement between Adsytech and the District for further work would have been a contract for the "future payment of money, in advance of or in excess of existing appropriations" and thus void *ab initio*. *Id*.

In support of its argument, the District contends that the purchase order became depleted once Adsystech submitted bills totaling $1,175,086.47 against a contract ceiling of $476,317. Appellee's Post Hr'g Br. 11. The record shows that this "depletion" would have occurred (if at all) on or around June 2, 2000, with Adsystech's submission of Invoice No. 4 for $405,717.31. *See* Appellant's Hr'g Ex. 35. If paid, the parties would have exceeded the $476,317 contract price by $285,558.96. We do not agree with the District's analysis. From an Anti Deficiency standpoint, there were sufficient appropriations during FY2000 and FY2001 to support Adsystech's continuing contract performance as noted herein.

> The Anti-Deficiency Act provides in pertinent part:
>
> § 1341. Limitations on expending and obligating amounts
> (a)(1) An officer or employee of the United States government or the District of Columbia government may not—
>
> (A) make or authorize an expenditure or obligation exceeding an amount available in an appropriation or fund for the expenditure or

> obligation;
>
> (B) involve either government in a contract or obligation for the payment of money before an appropriation is made unless authorized by law . . ..

31 U.S.C. § 1341(a)(1).

In *Appeal of Advantage Energy LLC*, CAB No. D-1199 (Dec. 3, 2010), http://app.cab.dc.gov/Worksite/download.asp?filepath=Opinion.PDF&minLevel=0[32], we noted the well settled rule that "as long as Congress has appropriated sufficient legally unrestricted funds to pay a contract at issue, the Government normally cannot back out of a promise to pay on grounds of insufficient appropriations, even if the contract uses language such as "subject to the availability of appropriations," and even if an agency's total lump-sum appropriation is insufficient to pay all the contracts the agency has made[.]" *Id.* (*citing Cherokee Nation v. Leavitt*, 543 U.S. 631, 637-38 (2005).

The FY 2000 District of Columbia Appropriations Act authorized $190,335,000 as an appropriation to the District "for the current fiscal year out of the general fund of the District of Columbia" for agencies within the Economic Development and Regulation cluster.[33] Public Law No. 106-113, Nov. 29, 1999, 113 Stat. 1501, 1505-08. Apart from a restriction directing $15,000,000 to District Business Improvement Districts, the remaining funds are unrestricted.[34] Based on the federal appropriation, the District enacted its own FY2000 budget, which included a lump sum appropriation of $3,597,000 in the DCRA contractual services line item. *Government of the District of Columbia, Proposed FY2001 Budget and Financial Plan*, B-100. Both figures noted above clearly exceed the $757,470 in outstanding invoices at issue here.

Additionally, the FY2001 District of Columbia Appropriations Act authorized $205,638,000 in appropriated funds within the Economic Development and Regulation cluster, with no restrictions germane to the instant case. Public Law No. 106-553, December 26, 2000, 114 Stat. 2762. Based on the FY 2001 federal appropriation, the District enacted its own budget which included a lump sum appropriation of $3,087,000 in the DCRA contractual services line item. *Government of the District of Columbia, Proposed FY2002 Budget and Financial Plan*, March 12, 2001, B-43. Similarly, it is clear that sufficient funds were appropriated to cover the claimed Adsystech amount. Thus, the Board's review of appropriations for fiscal years 2000 and 2001 leads us to conclude that the Anti-Deficiency Act does not bar Adsystech's entitlement claim herein.

The Provisions of Former D.C. Code §2-301.05(d)(3) Do Not Apply

---

[32] *Advantage Energy, LLC* is currently pending publication in the D.C. Register and in commercial databases. In the interim, we have cited to the Board's website, which is an acceptable alternative citation.

[33] The Board takes judicial notice that DCRA is within the Economic Development Regulation cluster of agencies.

[34] As to appropriation restrictions, there are a number of general restrictions that have no relevance instantly. For example, there are restrictions against the use of the appropriation for partisan political activity, or for publicity or propaganda to support or defeat congressional legislation. Public Law No. 106-113, §§110, 112, Nov. 29, 1999, 113 Stat. 1501.

Finally, the District argues that Adsystech's recovery is barred by former D.C. Code §2-301.05(d)(3). In pertinent part, the cited provision states as follows:

> (3) Except as authorized under paragraph (4) or (5) of this subsection, any vendor who, after April 12, 1997, enters into an oral agreement with a District employee to provide supplies or services to the District government without a valid written contract shall not be paid. If the oral agreement was entered into by District employee at the direction of a supervisor, the supervisor shall be terminated. The Mayor shall submit a report to the Council at least 4 times a year on the number of person cited or terminated under this paragraph.

Former D.C. Code §2-301.05(d)(3).

We reject appellee's argument regarding the above statutory provision for the same reason that we rejected its argument regarding former §2-301.05(d)(5): the Chief Technology Officer's Year 2000 contracts were exempt from PPA coverage during this period.

CONCLUSION

For the reasons noted herein, the Board finds that Adsystech is entitled to an equitable adjustment against the District. District contracting officers issued and/or ratified constructive change orders directing Adsystech to continue contract performance after the depletion of funds for the purpose of completing DCRA's Hansen upgrade. Because we have concluded that Adsystech is entitled to an equitable adjustment, we will not consider appellant's quantum meruit and equitable estoppel theories of recovery. The case is remanded to the appellee for a determination of quantum. The parties are instructed to inform the Board regarding the status of quantum discussions within 30 days.

SO ORDERED.

DATED: August 15, 2013

/s/ Marc D. Loud, Sr.
MARC D. LOUD, SR.
Chief Administrative Judge

CONCURRING:

/s/ Maxine E. McBean
MAXINE E. MCBEAN
Administrative Judge

Electronic Service to:

Lloyd J. Jordan, Esq.
Attorney at Law
264A G Street, S.W.
Washington, D.C. 20024

Matthew Lane, Esq.
Kim Matthews Johnson, Esq.
Office of the Attorney General
441 4th Street, N.W., 6th Floor South
Washington, D.C. 20001