In the United States Court of Federal Claims

No. 11-176 C

(Filed June 7, 2012)

UNPUBLISHED

PERRY L. BROCK D/B/A MACHINE TECHNOLOGIES,	*	Constitutional Claims; Tort Claims; Criminal Claims; Contract Disputes Act of 1978, 41 U.S.C.A. §§ 7101-7109 (West Supp. 2011); Cardinal Change; Termination for Default; Subject Matter Jurisdiction, RCFC 12(b)(1); Failure to State a Claim, RCFC 12(b)(6); Summary Judgment, RCFC 56.
Plaintiff,	*	
v.	*	
THE UNITED STATES,	*	
Defendant.	*	

Perry L. Brock d/b/a Machine Technologies, Lynchburg, TN, *pro se* plaintiff.

Scott Slater, United States Department of Justice, with whom were *Tony West*, Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Harold D. Lester, Jr.*, Assistant Director, Washington, DC, for defendant. *Major Tyson McDonald*, United States Army Litigation Division, of counsel.

OPINION

Bush, *Judge.*

Now pending before the court is defendant's motion for partial dismissal and for summary judgment, which was filed on January 6, 2012. The motion has been fully briefed and is ripe for a decision by the court. For the reasons discussed below, the government's motion is granted.

BACKGROUND[1]

I. Factual Background

Plaintiff Perry L. Brock, doing business as Machine Technologies, was awarded Contract No. W58RGZ-07-D-0014 on November 8, 2006. Declaration of Kimberly Tipton (Tipton Decl.) ¶ 2. Under that contract, Mr. Brock agreed to provide the United States Army Aviation and Missile Command at Redstone Arsenal, Alabama (AMCOM) with flight control rigging sets on an indefinite-delivery, indefinite-quantity (IDIQ) basis. *Id.* The contract specified a minimum-buy quantity of 475 units, to be ordered by the government at the time of contract award (year-one), at a price of $349 each. *Id.* ¶ 3; Def.'s App. at 7. The contract also provided for a maximum-buy quantity of 1500 units, with the remaining 1025 units to be available for procurement during the remaining four out-year periods of the contract. Tipton Decl. ¶ 3; Def.'s App. at 7. The contract set forth estimated procurement amounts of approximately 256 units per year for each of the four out-years in the event that the government decided to exercise its right to place orders beyond the 475 unit required minimum, up to the contract maximum number of 1500 units. *Id.* Although the sets were to be delivered to AMCOM, the contract was to be administered by the Defense Contract Management Agency Atlanta (DCMA). Tipton Decl. ¶ 2. Mr. Brock is the owner, president, and sole employee of his business.

Following the award of the subject contract, the parties became aware that the technical data package (TDP) for the subject contract was defective because some of the government specifications it contained had been cancelled without replacement. Def.'s App. at 1, 31-32. For that reason, Mr. Brock requested that he be allowed to deviate from the requirements of the TDP. *Id.* at 31-32. The government approved that request, and executed a series of modifications to the contract between November 2007 and April 2008 for the purpose of effecting the requested waiver. *Id.* at 1, 33-41.

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[1]/ The facts recounted here are taken from the parties' filings, and appear to be undisputed for the purpose of resolving defendant's motion for partial dismissal and for summary judgment. The court makes no findings of fact in this opinion.

In July 2008, the parties executed Modification No. 4 to the contract, which implemented an equitable adjustment for the defective specifications in the TDP and the government-caused delay attributable to those defective specifications. *Id.* at 42-52. Under the equitable adjustment, the government agreed to pay plaintiff $59,232.02 for additional costs he incurred between June 2007 and January 2008 (the first claim period). *Id.* at 44. The parties agreed to settle two additional categories of costs in a future equitable adjustment: (1) certain operating expenses that were incurred by Mr. Brock during the first claim period; and (2) additional costs incurred by Mr. Brock between January 2008 and July 2008 (the second claim period). *Id.* The parties agreed that, subject to those two exceptions, the modification represented a "complete equitable adjustment" for additional costs caused by the defective specifications and government-caused delay for the first claim period. *Id.* at 46. The modification also contained the following release:

> [T]he contractor hereby releases the government from any and all liability under this contract for further equitable adjustments attributable to such facts or circumstances giving rise to the proposal for adjustment except for the operational expenses proposed of $11,282.00 for the period from June 2007 through January 2008 and the second equitable adjustment proposal for the 7 month period from January 2008 through July 2008.

Id. The government paid Mr. Brock $59,232.02 under Modification No. 4 on August 28, 2008. Tipton Decl. ¶ 6.

In the midst of the back and forth between the parties with respect to the defective TDP and resultant contract modifications, plaintiff did deliver a portion of the rigging sets called for under the contract. Specifically, as of July 27, 2009, Mr. Brock had shipped AMCOM a total of 191 units, leaving an obligation of 284 units due under the contract's 475 minimum-buy quantity as ordered by the government.[2] Approximately a year after the last rigging sets had been delivered

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[2]/ These 191 rigging sets were, however, the only ones ever supplied by Mr. Brock despite the continued, extensive discourses between the parties, which the court describes in the continue...

by plaintiff, on August 2, 2010, Mr. Brock submitted to the contracting officer a Standard Form 95 (SF-95) demanding $66,147 for a government-caused delay of performance during the second claim period.[3] Def.'s App. at 53. The form indicated that the amount requested included $11,282 in operating expenses incurred during the first claim period which had not been included in the first equitable adjustment. *Id.*

On October 20, 2010, Kimberly Tipton, a contract specialist, requested that Mr. Brock provide supporting documentation for the costs set forth in the SF-95. *Id.* at 57. Ms. Tipton noted that only a portion of the operating expenses incurred for the first claim period had been substantiated, and that the costs for the second claim period had not been documented at all. *Id.* That same day, plaintiff responded to Ms. Tipton's request in two separate letters, both of which accused the government of unethical conduct and asserted that his constitutional rights had been violated. *Id.* at 58-60. In conjunction with his letters, Mr. Brock demanded that Ms. Tipton be removed as the contracting officer, but he did not provide the requested documentation for his asserted costs.[4] *Id.* at 58-59. Mr. Brock also alleged that Ms. Tipton had not properly processed his claims and had denied one of those claims without considering the evidence he had presented to her. *Id.* at 59. The next day, Mr. Brock sent another letter to the government alleging that AMCOM and DCMA had engaged in dilatory conduct in the administration of his

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[2]/ ...continue
remainder of this opinion's fact section.

[3]/ The SF-95 is a standard form requesting money for damage, injury, or death that must be presented to the appropriate federal agency before commencing suit against that agency under the Federal Tort Claims Act, 28 U.S.C. § 1346(b) (2006) (FTCA). *See* 28 U.S.C. § 2675(a) (2006) (requiring the submission of a claim to the appropriate federal agency before commencing a suit against that agency for "money damages for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment"); 28 C.F.R. § 14.2(a) (2012) (stating that an SF-95 requesting a sum certain meets the requirements of an FTCA claim).

[4]/ Mr. Brock apparently believed that Ms. Tipton was the contracting officer for the subject contract, but that does not appear to have been the case. During the relevant time period, a number of different individuals – Leslie Sandridge, Geraldine Williams, LeChara Fletcher, and Patricia Sandy – served as the contracting officer. Ms. Tipton was a contract specialist.

claims under the contract. *Id.* at 61-63. The letter also questioned the necessity of the documentation requested by Ms. Tipton in her earlier message.

Despite Mr. Brock's contentious correspondence, the parties executed Modification No. 5 to the subject contract on November 9, 2010, which represented a "complete equitable adjustment" for the additional operating expenses incurred by Mr. Brock during the first claim period, but not included in the first equitable adjustment for that period. Tipton Decl. ¶ 7. Under that modification, the government agreed to pay Mr. Brock $10,432.40, and plaintiff once again signed a release of all future claims against the government for costs caused by the defective TDP and government-caused delays, with the exception of costs incurred during the second claim period. *Id.*; Def.'s App. at 67.

On December 6, 2010, Ms. Tipton informed Mr. Brock that she had reviewed his claim for an equitable adjustment for increased costs incurred during the second claim period and would prepare the necessary contract modification and request the needed funding for the equitable adjustment. Def.'s App. at 73. In that same communication, Ms. Tipton expressed the government's intent to re-establish the delivery schedule for the remaining units under the contract and inquired as to the status of those units. *Id.*

On December 10, 2010, Mr. Brock responded to Ms. Tipton's message. *Id.* at 74-76. In his response, plaintiff referred to a proposed termination for convenience, and asserted that he was entitled to $623,084 in costs based on his belief that the government was obligated to order a minimum quantity of 256 units for each out-year of the contract. *Id.* Mr. Brock expressed his opinion that, with one minor exception, the earlier equitable adjustments should not be counted against any settlement costs due under a termination for convenience. *Id.* at 74. Finally, Mr. Brock stated that he was in possession of eighty-three flight rigging sets that were approximately eighty-five percent complete. *Id.* at 77.

On December 13, 2010, the parties executed Modification No. 6, which represented a "complete equitable adjustment" for additional costs incurred by plaintiff and attributable to the defective TDP and government-caused delays during the second claim period. *Id.* at 78-83. Under that modification, the government agreed to pay Mr. Brock $50,981.74, and Mr. Brock agreed to "release[] the government from any and all liability under this contract for further

equitable adjustments attributable to such facts or circumstances giving rise to the proposal for adjustment." *Id.* at 80. The government paid Mr. Brock $10,432.40 under Modification No. 5, and paid him $50,981.74 under Modification No. 6, on February 23, 2011. Tipton Decl. ¶ 9.

On December 21, 2010, the contracting officer once again attempted to re-establish a delivery schedule for the remaining rigging sets with Mr. Brock. Def.'s App. at 85-86. In her letter, the contracting officer informed plaintiff that he was in breach of the subject contract, and proposed a revised delivery schedule for the remaining units required under the contract. The contracting officer also informed Mr. Brock that the government was not required to purchase any flight rigging sets during the out-years of the contract, in contrast to Mr. Brock's assertions to the contrary.

On December 22, 2010, Mr. Brock sent a letter to Ms. Tipton accusing the government of attempting to terminate the subject contract for convenience, and stating that such an attempt was improper and constituted a breach of the contract. *Id.* at 87. In that letter, Mr. Brock declared that he would "not agree to any part," which presumably referred to the proposed delivery schedule set forth in the contracting officer's prior communication. *Id.* The same day, Ms. Tipton sent an e-mail to Mr. Brock, in which she stated that there must have been a miscommunication because the government had no intention of terminating the subject contract for convenience. *Id.* at 90. Instead, according to Ms. Tipton, the government sought to re-establish the delivery schedule for the outstanding units still required under the contract. Finally, Ms. Tipton requested that Mr. Brock confirm whether he was in fact refusing to make further deliveries to the government under the contract.

The next day, Mr. Brock sent a letter in response to Ms. Tipton's e-mail. *Id.* at 91. In that letter, Mr. Brock stated that resuming deliveries under the contract was not realistic because he would have to renegotiate contracts with his vendors, and once again asserted that the government was obligated under the contract to order 256 flight rigging sets in each of the contract's out-years.

Mr. Brock sent another letter on December 27, 2010. *Id.* at 92-93. In that letter, plaintiff suggested – in stark contrast to his prior communications – that a termination of the subject contract for convenience would be the most appropriate

resolution of the ongoing dispute between him and the government. In addition, Mr. Brock appeared to question the fairness and constitutionality of any interpretation of the contract that did not require the government to purchase a minimum number of 256 units in the out-years.

On January 3, 2011, Ms. Tipton sent Mr. Brock an e-mail, in which she once again inquired as to the status of the remaining flight rigging sets required under the contract. *Id.* at 94. Ms. Tipton acknowledged Mr. Brock's request that the contract be terminated for convenience, and indicated that the government would entertain a no-cost termination for convenience but would not consider Mr. Brock's request for $623,084 in additional compensation.

On January 4, 2011, Mr. Brock sent a letter to Ms. Tipton, in which he demanded $465,000 for various alleged breaches of the subject contract and other alleged acts of malfeasance on the part of the government, including allegations raised in a previous suit in this court, discussed *infra*, and based in part on the defective specifications in the TDP. *Id.* at 95-96. Mr. Brock asserted that various government breaches had voided the contract.[5]

The contracting officer denied Mr. Brock's claim for $465,000 on February 9, 2011. *Id.* at 97-98. In her letter, the contracting officer stated that the claim was based on the same allegations that formed the basis of the equitable adjustments for the defective specifications and government-caused delay and was therefore covered by the releases signed by Mr. Brock in connection with those adjustments. The contracting officer also noted that the requested costs were not substantiated. Finally, the contracting officer reiterated her earlier statement that the government was obligated to purchase only the minimum number of flight rigging sets set forth in the contract – 475 units – and was "attempting to do this by reestablishing the delivery schedule." *Id.* at 97.

On February 14, 2011, Ms. Tipton sent an e-mail to Mr. Brock, *id.* at 99, to which she attached Modification No. 7 to the subject contract, *id.* at 100-03. That modification established a new delivery schedule for the remaining units

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[5]/ In his letter, Mr. Brock also represented that he would supply the government with eighty-eight flight rigging sets "of [his] own free will," but there is no evidence that he delivered the promised number of sets – or any number of sets – after July 27, 2009. Tipton Decl. ¶ 12.

required under the contract. In her message, Ms. Tipton informed Mr. Brock that the government would be willing to delay the initial delivery date by thirty days upon his request. The same day, Mr. Brock sent two letters to both Ms. Tipton and the commander of AMCOM, in which he once again accused the government of various acts of misconduct and claimed that the government had effected a cardinal change to the subject contract. *Id.* at 104-05. Mr. Brock also asserted that the government had abandoned the contract and that the modification establishing the new delivery schedule was therefore invalid. With those letters, Mr. Brock also submitted a new SF-95, which demanded $135,000. *Id.* at 106.

On February 28, 2011, the contracting officer sent a letter to plaintiff, in which she stated that the government had not abandoned the contract, as suggested by plaintiff, but instead sought to re-establish the delivery schedule for the outstanding units under the contract. *Id.* at 108. The contracting officer also informed plaintiff that, unless he provided adequate assurances of performance within ten days, the contract would be terminated for default based on Mr. Brock's repudiation. The same day, Mr. Brock sent a letter addressed to Ms. Tipton stating that the new schedule effected a cardinal change to the contract, that the government had abandoned the contract, and that the earlier equitable adjustments did not preclude claims for subsequently discovered wrongdoing on the part of the government. *Id.* at 109-11. Mr. Brock asserted that the government had initiated discussions related to a proposed termination for convenience, but then retreated from those discussions when it appeared that such a termination would not benefit the government. Mr. Brock closed his letter with the following announcement: "I am prepared and stand ready to litigate. No surrender." *Id.* at 111.

On March 3, 2011, Mr. Brock submitted another letter to Ms. Tipton, in which he demanded $232,000 for additional costs attributable to the defective specifications in the TDP. *Id.* at 112-13. In that letter, Mr. Brock asserted that the government had abandoned the contract, that the modifications to the contract – including the equitable adjustments – were not supported by consideration, and that the contracting officer would be held personally liable for her alleged wrongdoing. *Id.*

The contracting officer denied the $232,000 claim on March 14, 2011 because it was based on the same defective specifications that formed the basis of the earlier equitable adjustments embodied in Modification Nos. 4 through 6. *Id.* at

114-15.

On March 15, 2011, Mr. Brock sent a letter to Ms. Tipton, in which he stated that she had no authority to deny his claim because she was required to recuse herself from the administration of his contract. *Id.* at 116. The next day, Mr. Brock sent another letter addressed to Ms. Tipton, the "AMCOM JAG," and the United States Department of Justice, in which he set forth a list of purported reasons that Ms. Tipton was no longer allowed to serve as the contracting officer. *Id.* at 117-20. Specifically, Mr. Brock argued that Ms. Tipton had violated the standards of conduct for federal government employees. *Id.* (citing 5 C.F.R. § 2635.101 (2012)). On March 17, 2011, the contracting officer terminated the subject contract for default, and e-mailed a letter and a copy of Modification No. 8, which effected the termination, the same day. *See id.* at 121-32.

II. Prior Suit in this Court

Mr. Brock filed a prior suit in this court in June 2009 based on a dispute with DCMA officials that arose shortly after award of the subject contract. *See Brock v. United States*, No. 09-384C, slip. op. (Fed. Cl. Apr. 6, 2010) (*Brock I*). In that suit, Mr. Brock raised several claims under various constitutional, statutory, and regulatory provisions. The court concluded that none of those claims was within the subject matter jurisdiction of this court. Mr. Brock also raised contract claims under the Contract Disputes Act of 1978, 41 U.S.C.A. §§ 7101-7109 (West Supp. 2011) (CDA). Those claims were dismissed because plaintiff failed to demonstrate that he had exhausted his administrative remedies before commencing suit in this court by filing a proper claim with the contracting officer.

III. Procedural History

Plaintiff filed his initial complaint in this suit on March 21, 2011, and moved to amend that complaint on April 7, 2011. The court granted plaintiff's motion to amend the complaint, and Mr. Brock then sought to add additional claims to his first amended complaint on May 27, 2011. The government objected to Mr. Brock's motion to amend his amended complaint, asserting that the new claims set forth in that motion were beyond the subject matter jurisdiction of the court. In addition, the government also moved for a more definite statement under Rule 12(e) of the Rules of the United States Court of Federal Claims (RCFC). The court

granted defendant's motion for a more definite statement and ordered Mr. Brock to file a second amended complaint, which he filed on August 11, 2011. The court stated that the second amended complaint would supersede all earlier complaints filed in this matter.

On August 29, 2011, the government filed a motion to dismiss the second amended complaint pursuant to RCFC 12(b)(1) and RCFC 12(b)(6). Mr. Brock responded to that motion on September 12, 2011, and attached several documents to his response in support of his claims.

On September 29, 2011, defendant filed a motion with the court in which it requested a thirty-day suspension of proceedings for the purpose of investigating whether some of the claims set forth in Mr. Brock's second amended complaint were in fact within the subject matter jurisdiction of this court. The court granted that motion on October 11, 2011. On October 26, 2011, defendant filed a status report, which indicated that, contrary to the arguments set forth in defendant's original motion to dismiss, one of the claims set forth in the second amended complaint was in fact within the subject matter jurisdiction of this court. For that reason, defendant requested that the court afford defendant forty-five days in which to file a comprehensive dispositive motion in this case and allow plaintiff an equal amount of time in which to file a response to that motion.

On November 21, 2011, Mr. Brock filed a motion with the court, in which he argued that defendant's initial motion to dismiss contained fraudulent statements, and that defendant should not be permitted to withdraw that motion. For that reason, plaintiff requested that the court impose sanctions upon defendant and defendant's counsel pursuant to RCFC 11(c). In addition, plaintiff requested a default judgment against the government pursuant to RCFC 55. Finally, plaintiff presented a number of arguments related to this court's subject matter jurisdiction as well as the merits of certain of his claims. The court denied plaintiff's motion and established a schedule for the briefing of a comprehensive dispositive motion to be filed by the government. Defendant filed a motion for partial dismissal and for summary judgment on January 6, 2012, and Mr. Brock responded to that motion on January 25, 2012. The government replied to Mr. Brock's response on February 7, 2012.

DISCUSSION

I. *Pro Se* Litigants

Pro se plaintiffs are entitled to a liberal construction of their pleadings. *See Haines v. Kerner*, 404 U.S. 519, 520 (1972) (requiring that allegations contained in a *pro se* complaint be held to "less stringent standards than formal pleadings drafted by lawyers"). However, "[t]here is no duty on the part of the trial court to create a claim which [the plaintiff] has not spelled out in his pleading." *Scogin v. United States*, 33 Fed. Cl. 285, 293 (1995) (quoting *Clark v. Nat'l Travelers Life Ins. Co.*, 518 F.2d 1167, 1169 (6th Cir. 1994)). Here, the court has thoroughly examined the second amended complaint and the other documents filed by plaintiff in this matter, particularly the exhibits attached to his response to the government's initial motion to dismiss (Pl.'s 1st Resp.) and has attempted to discern all of the legal arguments contained therein.

II. Jurisdiction and Standard of Review

A. Standard of Review under RCFC 12(b)(1)

In rendering a decision on a motion to dismiss for lack of subject matter jurisdiction pursuant to RCFC 12(b)(1), this court must presume all undisputed factual allegations to be true and must construe all reasonable inferences in favor of the plaintiff. *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974), *abrogated on other grounds by Harlow v. Fitzgerald*, 457 U.S. 800, 814-15 (1982); *Reynolds v. Army & Air Force Exch. Serv.*, 846 F.2d 746, 747 (Fed. Cir. 1988). The relevant issue in a motion to dismiss under RCFC 12(b)(1) "'is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims.'" *Patton v. United States*, 64 Fed. Cl. 768, 773 (2005) (quoting *Scheuer*, 416 U.S. at 236). The plaintiff bears the burden of establishing subject matter jurisdiction, *Alder Terrace, Inc. v. United States*, 161 F.3d 1372, 1377 (Fed. Cir. 1998) (citing *McNutt v. Gen. Motors Acceptance Corp. of Ind.*, 298 U.S. 178, 189 (1936)), and must do so by a preponderance of the evidence, *Reynolds*, 846 F.2d at 748 (citations omitted). Although "pro se plaintiffs are held to a lower standard of pleading than those represented by counsel, all those seeking to invoke this court's subject matter jurisdiction ultimately retain the burden of establishing that the jurisdictional requirements are met." *See Searles v. United States*, 88 Fed.

Cl. 801, 803 (2009) (citing *Keener v. United States*, 551 F.3d 1358, 1361 (Fed. Cir. 2009)); *Minehan v. United States*, 75 Fed. Cl. 249, 253 (2007) ("[T]he leniency afforded to a *pro se* litigant with respect to mere formalities does not relieve the burden to meet jurisdictional requirements.").

The court may look at evidence outside of the pleadings in order to determine its jurisdiction over a case. *Martinez v. United States*, 48 Fed. Cl. 851, 857 (2001) (citing *RHI Holdings, Inc. v. United States*, 142 F.3d 1459, 1461-62 (Fed. Cir. 1998); *Rocovich v. United States*, 933 F.2d 991, 993 (Fed. Cir. 1991)), *aff'd in relevant part*, 281 F.3d 1376 (Fed. Cir. 2002). "Indeed, the court may, and often must, find facts on its own." *Id.* If jurisdiction is found to be lacking, this court must dismiss the action. RCFC 12(h)(3).

The Tucker Act provides in relevant part that the

> United States Court of Federal Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.

28 U.S.C. § 1491(a)(1) (2006). While the Tucker Act constitutes a limited waiver of the government's sovereign immunity, that statute "does not create a substantive cause of action; in order to come within the jurisdictional reach and the waiver of the Tucker Act, a plaintiff must identify a separate source of substantive law that creates the right to money damages." *Fisher v. United States*, 402 F.3d 1167, 1172 (Fed. Cir. 2005) (*en banc* in relevant part). In addition, "[n]ot every claim invoking the Constitution, a federal statute, or a regulation is cognizable under the Tucker Act." *United States v. Mitchell*, 463 U.S. 206, 216 (1983). On the contrary,

> [t]he claim must be one for money damages against the United States, *see United States v. King*, 395 U.S. 1, 2-3 (1969), and the claimant must demonstrate that the source of substantive law he relies upon "can be fairly

> interpreted as mandating compensation by the Federal Government for the damages sustained."

Id. at 216-17 (quoting *United States v. Testan*, 424 U.S. 392, 400 (1976)) (internal quotations omitted). If the asserted constitutional or statutory basis of a claim does not mandate the payment of money by the government, the court must dismiss the action because "the absence of a money-mandating source [is] fatal to the court's jurisdiction under the Tucker Act." *Fisher*, 402 F.3d at 1173.

B. Standard of Review under RCFC 12(b)(6)

It is well-settled that a complaint should be dismissed under RCFC 12(b)(6) "when the facts asserted by the claimant do not entitle him to a legal remedy." *Lindsay v. United States*, 295 F.3d 1252, 1257 (Fed. Cir. 2002). When considering a motion to dismiss under this rule, "the allegations of the complaint should be construed favorably to the pleader." *Scheuer*, 416 U.S. at 236. "[W]hen the allegations in a complaint, however true, could not raise a claim of entitlement to relief," dismissal is warranted under RCFC 12(b)(6). *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 558 (2007). To survive a motion to dismiss for failure to state a claim, a complaint must contain "more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Id.* at 555. While a complaint is not required to contain detailed factual allegations, it must provide "enough facts to state a claim for relief that is plausible on its face." *Id.* at 570. In order to meet the requirement of facial plausibility, the plaintiff must plead "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

C. Standard of Review under RCFC 56

"[S]ummary judgment is a salutary method of disposition designed to secure the just, speedy and inexpensive determination of every action." *Sweats Fashions, Inc. v. Pannill Knitting Co.*, 833 F.2d 1560, 1562 (Fed. Cir. 1987) (internal quotations and citations omitted). The moving party is entitled to summary judgment "if the movant shows that there is no genuine issue as to any material fact and the movant is entitled to judgment as a matter of law." RCFC 56(a). A genuine issue of material fact is one that could change the outcome of the

litigation. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986). A summary judgment "motion may, and should, be granted so long as whatever is before the . . . court demonstrates that the standard for the entry of summary judgment, as set forth in Rule 56[], is satisfied." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986).

"[A] party seeking summary judgment always bears the initial responsibility of informing the . . . court of the basis for its motion, and identifying those portions of 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,' which it believes demonstrate the absence of a genuine issue of material fact." *Id.* (quoting former version of Fed. R. Civ. P. 56(c)). However, the non-moving party has the burden of producing sufficient evidence that there is a genuine issue of material fact in dispute which would allow a reasonable finder of fact to rule in its favor. *Anderson*, 477 U.S. at 256. Such evidence need not be admissible at trial; nevertheless, mere denials, conclusory statements or evidence that is merely colorable or not significantly probative is not sufficient to preclude summary judgment. *Celotex*, 477 U.S. at 324; *Anderson*, 477 U.S. at 249-50; *Barmag Barmer Maschinenfabrik AG v. Murata Mach., Ltd.*, 731 F.2d 831, 835-36 (Fed. Cir. 1984). "The party opposing the motion must point to an evidentiary conflict created on the record at least by a counter statement of a fact or facts set forth in detail in an affidavit by a knowledgeable affiant." *Barmag*, 731 F.2d at 836. Any evidence presented by the non-movant is to be believed and all justifiable inferences are to be drawn in its favor. *Anderson*, 477 U.S. at 255 (citing *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 158-59 (1970)).

III. Plaintiff's Claims

Plaintiff advances a number of claims in his second amended complaint. Some of those claims are within this court's subject matter jurisdiction, and some are not, but none of them has any merit.

A. Constitutional, Tort, and Other Miscellaneous Claims

Mr. Brock asserts that the government has discriminated against him and has violated constitutional principles of equal protection. Compl. ¶¶ 26, 28. As the court held in *Brock I*, however, the Fourteenth Amendment of the United States Constitution, including the Equal Protection Clause, does not impose any

substantive constraints upon the actions of the federal government. *See* U.S. Const. amend. XIV, § 1 ("No *State* shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any *State* deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.") (emphasis added); *Lowe v. United States*, 76 Fed. Cl. 262, 266 (2007) (holding that this court does not possess jurisdiction over claims under the Due Process Clause of the Fourteenth Amendment). Because the Fourteenth Amendment applies only to state actors, the court does not have jurisdiction to address any alleged violation of that constitutional provision. *See* 28 U.S.C. § 1491(a)(1) (providing that the court "shall have jurisdiction to render judgment upon any claim *against the United States* founded . . . upon the Constitution") (emphasis added).

Mr. Brock also asserts that the government has violated his due process rights. Compl. ¶ 26. As discussed in *Brock I*, however, this court is without jurisdiction over claims under the Due Process Clause because that constitutional provision does not mandate the payment of money by the government. *See, e.g.*, *LeBlanc v. United States*, 50 F.3d 1025, 1028 (Fed. Cir. 1995) (holding that this court has no subject matter jurisdiction over claims arising under the Due Process Clause); *Carruth v. United States*, 627 F.2d 1068, 1081 (Ct. Cl. 1980) ("This court has no jurisdiction over claims based upon the Due Process and Equal Protection guarantees of the Fifth Amendment, because these constitutional provisions do not obligate the Federal Government to pay money damages.").

Mr. Brock alleges that DCMA violated his Fourth Amendment rights, Compl. ¶ 27, but this court does not have jurisdiction over suits under that constitutional provision, as explained in *Brock I*. *See Brown v. United States*, 105 F.3d 621, 623 (Fed. Cir. 1997) ("Because monetary damages are not available for a Fourth Amendment violation, the Court of Federal Claims does not have jurisdiction over such a violation."); *Stephanatos v. United States*, 81 Fed. Cl. 440, 445 (2008) (holding that this court may not exercise jurisdiction over alleged violations of the Fourth Amendment).

In his second amended complaint, Mr. Brock contends that government officials have engaged in mail and wire fraud, Compl. ¶ 15(c), both of which are federal crimes. *See* 18 U.S.C. §§ 1341, 1343 (2006). But as explained in *Brock I*, this court may not exercise subject matter jurisdiction over any claims related to

alleged criminal violations by the federal government. *See Joshua v. United States*, 17 F.3d 378, 379 (Fed. Cir. 1994) (noting that "[t]he court has no jurisdiction to adjudicate any claims whatsoever under the federal criminal code"); *Kania v. United States*, 650 F.2d 264, 268 (Ct. Cl. 1981) ("[T]he role of the judiciary in the high function of enforcing and policing the criminal law is assigned to the courts of general jurisdiction and not to this court. . . . It is particularly unreasonable to suppose that Congress in enacting the Tucker Act intended for this court to intervene in the delicate and sensitive business of conducting criminal trials."); *Reid v. United States*, 95 Fed. Cl. 243, 249 (2010) ("The Court of Federal Claims does not possess jurisdiction over criminal claims."); *Hufford v. United States*, 87 Fed. Cl. 696, 702 (2009) ("This court lacks jurisdiction to adjudicate criminal claims.").

Mr. Brock also alleges tortious conduct on the part of the government, including negligence, misrepresentation, slander, libel, and defamation. None of those claims are within this court's jurisdiction. *See* 28 U.S.C. § 1491(a)(1) (stating that the court's jurisdiction is limited to cases "not sounding in tort"); *see also Keene Corp. v. United States*, 508 U.S. 200, 214 (1993) (noting that "tort cases are outside the jurisdiction of the Court of Federal Claims"); *Brown v. United States*, 105 F.3d 621, 623-24 (Fed. Cir. 1997) (noting that the court "lacks jurisdiction over tort actions against the United States"). The district courts are the only proper fora for tort claims against the federal government. *See Hall v. United States*, 91 Fed. Cl. 762, 771 (2010) ("The Federal Tort Claims Act ('FTCA') grants the United States district courts exclusive jurisdiction to hear tort claims against the United States, and, therefore, the proper forum for federal tort claims is a United States district court."); *Brown v. United States*, 74 Fed. Cl. 546, 549 (2006) (holding that "the FTCA grants exclusive jurisdiction to the United States federal district courts regarding tort claims against the United States Government"). To the extent that any of Mr. Brock's claims are premised on tort liability, such claims must be dismissed.

Mr. Brock also alleges antitrust violations on the part of DCMA, Compl. ¶ 32, but, again, this court may not exercise jurisdiction over such claims. *See* 28 U.S.C. § 1337(a) (2006) (stating that the district courts have original jurisdiction over "any civil action or proceeding arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies"); *Hufford*, 87 Fed. Cl. at 703 (holding that violations of the Sherman Antitrust Act,

15 U.S.C. §§ 1-7 (2006), are within the exclusive jurisdiction of the district courts).

The types of claims discussed above are never – under any circumstances – within this court's subject matter jurisdiction and therefore may never be litigated in this court. Mr. Brock appears to believe that those claims may be raised in this forum because they were dismissed without prejudice in *Brock I*. Because the court dismissed Mr. Brock's constitutional, statutory, and tort claims for lack of subject matter jurisdiction, it was required to dismiss those claims without prejudice. *See Scott Aviation v. United States*, 953 F.2d 1377, 1378 (Fed. Cir. 1992) ("Without jurisdiction, the Claims Court cannot presume to dismiss the complaint with prejudice.") (citation omitted). For the reasons discussed above, as was the case in *Brock I*, all of the claims set forth in the second amended complaint – with the exception of Mr. Brock's contract, takings, and bad-faith claims, which are discussed below – must be dismissed for lack of subject matter jurisdiction.

Mr. Brock also alleges that the government effected a taking of his private property without just compensation. Compl. ¶¶ 25-26. While this court may exercise jurisdiction over claims for just compensation under the Takings Clause of the Fifth Amendment, as the court noted in *Brock I*, Mr. Brock has not identified any specific private property interest that has been taken by the government. *See* RCFC 9(i) ("In pleading a claim for just compensation under the Fifth Amendment of the United States Constitution, a party must identify the specific property interest alleged to have been taken by the United States."). Because Mr. Brock has failed to meet that threshold requirement, his takings claims must be dismissed under RCFC 12(b)(6) for failure to state a claim.

Finally, Mr. Brock repeatedly asserts in his second amended complaint that various government officials have acted in bad faith and thus implicitly argues that the government has breached its implied duty of good faith and fair dealing in the administration of the contract. There is a strong presumption, however, that government employees perform their duties in good faith, and that presumption can be overcome only with "well-nigh irrefragable proof" of bad faith on the part of those employees. *See, e.g.*, *Torncello v. United States*, 681 F.2d 756, 770 (Ct. Cl. 1982); *Kalvar Corp. v. United States*, 543 F.2d 1298, 1302 (Ct. Cl. 1976).

The allegations of bad faith set forth in the second amended complaint and in the multiple claims submitted to the contracting officer appear to be based on

mere innuendo and speculation, and this court has held that those types of unsupported assertions do not meet the standard of well-nigh irrefragable proof. *See J. Cooper & Assocs., Inc. v. United States*, 53 Fed. Cl. 8, 25 (2002) ("Mere speculation on the part of the plaintiff is an insufficient basis to meet the rigorous test to establish bad faith."). The Federal Circuit has also noted that a plaintiff "cannot defeat summary judgment . . . with just bald assertions and speculation of wrongful conduct." *T & M Distribs., Inc. v. United States*, 185 F.3d 1279, 1285 (Fed. Cir. 1999) (citations omitted). Instead, the plaintiff must present evidence of "some specific intent to injure the plaintiff," which might be found where there is evidence of actions "motivated alone by malice," or governmental conduct that is "designedly oppressive." *Kalvar*, 543 F.2d at 1302. But when the government is not "actuated by animus toward the plaintiff," any claim of bad faith must fail. *Id.*

Here, there is no evidence of such animus on the part of the government. Rather, it appears that plaintiff was frustrated by what he believed to be the negligent administration of his contract by officials at AMCOM and DCMA, and his perception that those officials did not respect him. *See, e.g.*, Compl. ¶¶ 33 (asserting that the government's actions were motivated by Mr. Brock's "slow talking southern dialect that seems to invite wrongful assumptions that he can't possibly be on the same intellectual level as government actors who used the right 'buzz words' on the selection criteria for obtaining their present positions"), 34 ("The record shows that the government actors considered the plaintiff to be a fool who couldn't possibly understand his worthless position in American society."). Indeed, the evidence of record demonstrates that the government accommodated Mr. Brock on a number of occasions by, for example, executing modifications to the contract that waived the defective specifications in the TDP and implemented equitable adjustments for the additional costs incurred by Mr. Brock, as well as making multiple unsuccessful attempts to re-establish the delivery schedule when plaintiff steadfastly refused to deliver the obligated rigging sets.

The trail of e-mails and other correspondence reflects that contracting personnel, even in the face of inflammatory and derisive statements made by Mr. Brock, declined to respond in kind, but rather remained professional in their efforts to compromise with plaintiff. To the extent that the record reflects any animus, it appears to have emanated from Mr. Brock, directed toward government personnel attempting to salvage the contract. In response to Ms. Tipton's request for documentation of the costs claimed for the second claim period, for example,

Mr. Brock refers to government personnel as his "enemies." Def.'s App. at 63. In the absence of any evidence of malice or animus toward plaintiff, his claims of bad faith must fail.

B. Contract Claims

This court has subject matter jurisdiction over claims for money damages against the federal government based upon "any express or implied contract with the United States . . . ." 28 U.S.C. § 1491(a)(1). The Tucker Act further provides that

> [t]he Court of Federal Claims shall have jurisdiction to render judgment upon any claim by or against, or dispute with, a contractor arising under section 10(a)(1) of the Contract Disputes Act of 1978, *including a dispute concerning termination of a contract*, rights in tangible or intangible property, compliance with cost accounting standards, and other nonmonetary disputes on which a decision of the contracting officer has been issued under section 6 of that Act.

28 U.S.C. § 1491(a)(2) (2006) (emphasis added). In short, this court possesses subject matter jurisdiction to hear claims for monetary and non-monetary relief under the CDA, including claims for breach of contract and unlawful termination of a contract.

Before filing suit in this court under the CDA, a plaintiff must first submit a written claim to the contracting officer for a final decision. 41 U.S.C.A. § 7103(a). Although the CDA does not define the term "claim," the Federal Acquisition Regulation (FAR) describes a claim as "a written demand or written assertion by one of the contracting parties seeking, as a matter of right, the payment of money in a sum certain, the adjustment or interpretation of contract terms, or other relief arising under or relating to the contract." 48 C.F.R. § 2.101 (2011). The Federal Circuit has further explained that a valid claim must contain both: "(1) adequate notice of the basis and amount of a claim and (2) a request for a final decision." *M. Maropakis Carpentry, Inc. v. United States*, 609 F.3d 1323, 1328 (Fed. Cir. 2010). When a claim seeks more than $100,000, it must be certified in accordance with

section 7103, 41 U.S.C.A. § 7103(b)(1), but a defective certification may be corrected during the pendency of a suit in this court, *id.* § 7103(b)(3).

The submission of a written claim to the contracting officer and a final decision on that claim are both jurisdictional prerequisites to a suit in this court. *See Maropakis*, 609 F.3d at 1327 ("This Court has found that jurisdiction thus requires both a valid claim and a contracting officer's final decision on that claim.") (citation omitted); *England v. Swanson Grp., Inc.*, 353 F.3d 1375, 1379 (Fed. Cir. 2004) ("We have held, based on the statutory provisions [of the CDA], that the jurisdiction over an appeal of a contracting officer's decision is lacking unless the contractor's claim is first presented to the contracting officer and that officer renders a final decision on the claim." (citing *James M. Ellett Constr. Co. v. United States*, 93 F.3d 1537, 1541-42 (Fed. Cir. 1996))).

In this suit, Mr. Brock seeks to recover tens of millions of dollars in damages under a contract with an initial total value of less than $190,000. Defendant argues that some of the contract claims raised in this suit must be dismissed because they were not preceded by the submission of a proper claim to the contracting officer. Defendant further argues that there are no genuine issues of material fact with respect to any of the remaining contract claims, and that the government is entitled to judgment as a matter of law on those contract claims. The court agrees.

In his second amended complaint, Mr. Brock describes seven claims that were allegedly submitted to the contracting officer and requested a sum certain. In addition, Mr. Brock makes a number of oblique statements about an alleged cardinal change to his contract and the alleged wrongfulness of the government's termination of that contract for default. For the reasons discussed below, plaintiff cannot prevail on any of his contract claims.

1. First Claim: $23 million

Mr. Brock first asserts that he submitted a claim to the contracting officer for the amount of $23 million. Compl. ¶ 13.[6] The second amended complaint states

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[6]/ This paragraph is misnumbered in the second amended complaint as paragraph 14, but continue...

that this particular claim was based on evidence submitted in *Brock I*, and describes the claim as being based on a number of constitutional violations and tortious actions that are, for reasons discussed above, beyond the jurisdiction of this court. Mr. Brock submitted this claim to AMCOM and DCMA in July 2010. *See* Pl.'s 1st Resp. Ex. J. Because the allegations contained in the $23 million claim are not within the subject matter jurisdiction of this court, any suit based on that claim is likewise beyond the court's jurisdiction and must be dismissed.

2. Second Claim: $12.5 million

Next, Mr. Brock asserts that he submitted a claim to the contracting officer for the amount of $12.5 million. Compl. ¶ 14.[7] This claim also appears to be based on various alleged violations of the United States Constitution and torts committed by the government. The second amended complaint states that this claim was also based on an alleged cardinal change of Mr. Brock's contract and a wrongful termination of that contract for default, but there is no mention of either of those grounds in the actual claim submitted by Mr. Brock.[8] Instead, the claim refers to "constitutional torts," "equal protection," "misrepresentation," "negligence," "liberty of contract," and "discriminatory actions." Pl.'s 1st Resp. Ex. J. In short, the $12.5 million claim must be dismissed for the same reason as the $23 million claim – it is beyond the subject matter jurisdiction of this court.

3. Third Claim: $465,000

Mr. Brock also describes a claim submitted to the contracting officer for the

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[6]/ ...continue
it is actually paragraph 13. In this opinion, the court shall refer to the paragraphs of the second amended complaint by their actual placement in the complaint, rather than by their designation by plaintiff.

[7]/ This paragraph is labeled as paragraph 15 in the second amended complaint.

[8]/ In fact, the $12.5 million claim is dated September 27, 2010, *see* Pl.'s 1st Resp. Ex. J at 5, but the subject contract was not terminated for default until nearly six months later, in March 2011, *see* Tipton Decl. ¶ 11.

amount of $465,000. Compl. ¶ 15.[9] In the second amended complaint, Mr. Brock states that this claim was based on the contracting officer's bad-faith conduct in the administration of an equitable adjustment for increased costs caused by defective specifications in the initial solicitation and for government-caused delays related to those defective specifications. In addition, Mr. Brock alleges in the second amended complaint that government officials engaged in mail and wire fraud. Finally, plaintiff states that the claim was based on a cardinal change to the subject contract and the government's wrongful termination of that contract for default.[10] The claim submitted to the government repeats many of the same allegations raised in the earlier suit in this court, and states that those alleged transgressions voided the contract. Def.'s App. at 95-96. To the extent that the $465,000 claim is based on allegations of criminal conduct by government officials – *i.e.*, mail and wire fraud – it is beyond this court's subject matter jurisdiction, as discussed above.[11] *See, e.g.*, *Joshua*, 17 F.3d at 379. As discussed above, moreover, Mr. Brock has failed to demonstrate any bad faith on the part of the government in this case.

To the extent that the claim is based on alleged increased costs attributable to the defective specifications contained in the TDP or to any government-caused delay related to those defects, the claim is barred under the doctrine of accord and satisfaction, as the government argues in its motion for summary judgment. The Federal Circuit has explained that "[d]ischarge of a claim by accord and satisfaction occurs when some performance different from that which was claimed as due is rendered and such substituted performance is accepted by the claimant as full satisfaction of his claim." *Cmty. Heating & Plumbing Co. v. Kelso*, 978 F.2d 1575, 1581 (Fed. Cir. 1993) (citation omitted). In order to succeed on its defense of accord and satisfaction, the government must meet four separate elements: (1) proper subject matter; (2) competent parties; (3) a meeting of the minds of the parties; and (4) consideration. *O'Connor v. United States*, 308 F.3d 1233, 1240

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[9]/ This paragraph is labeled as paragraph 16 in the complaint.

[10]/ The $465,000 claim, like the $12.5 million claim, pre-dated the government's termination of the subject contract for default and therefore cannot provide the jurisdictional basis for a subsequent suit based on the termination.

[11]/ The second amended complaint describes the $465,000 claim as including allegations of mail and wire fraud, but those allegations are not mentioned in the claim that was actually submitted to the contracting officer.

(Fed. Cir. 2002) (citation omitted). In determining whether a contractual release signed as part of a contract modification meets those four elements, the court must interpret the release in the same manner as any other contract term or provision. *Bell BCI Co. v. United States*, 570 F.3d 1337, 1341 (Fed. Cir. 2009).

Here, as previously discussed, it is undisputed that the TDP contained defective specifications. Based on a request from Mr. Brock, the parties executed a series of modifications to the subject contract that allowed plaintiff to deviate from those specifications. In addition, the parties agreed to equitable adjustments, in the form of three additional contract modifications, under which the government agreed to make additional payments to plaintiff in the amount of approximately $120,000 as compensation for the additional costs incurred by plaintiff due to the delays caused by the defective specifications. In consideration of those payments, plaintiff released the government from "any and all liability under this contract for further equitable adjustments attributable to such facts or circumstances giving rise to the proposal for adjustment[.]" Def.'s App. at 46, 67, 80.

Mr. Brock does not assert that any of the four elements of accord and satisfaction were not met in this case; instead, he simply asserts that "[t]he plaintiff signed no 'waivers' that an honorable person would seek to enforce under these circumstances." Pl.'s 2d Resp. ¶ 3. Aside from failing to explain how the liability releases were "dishonorable," Mr. Brock cites no authority for the proposition that an agreement between the parties must be "honorable" to meet the requirements of accord and satisfaction. In short, the government is entitled to judgment as a matter of law with respect to any claims based on the equitable adjustments to the subject contract.[12]

Finally, the $465,000 claim must be rejected to the extent that it is based on an alleged cardinal change to the contract. When the government changes the

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[12]/ While Mr. Brock does not argue in his response to the government's motion that the requirements of accord and satisfaction have not been met in this case, one of his earlier claims appeared to assert that the equitable adjustments were not supported by consideration. *See* Def.'s App. at 112-13. But there is no question that the equitable adjustments were supported by consideration because Mr. Brock was paid more than $120,000 under those equitable adjustments. The releases expressly state, moreover, that they were executed in consideration of the equitable adjustments. *See id.* at 46, 67, 80.

performance required under a contract in a manner that effectively requires the contractor to perform duties that are materially different than those set forth in the contract, due to additional work or substantially increased burdens, the contractor may pursue a claim for breach of that contract under the doctrine of cardinal change. *See, e.g.*, *Krygoski Constr. Co. v. United States*, 94 F.3d 1537, 1543 (Fed. Cir. 1996). Here, however, Mr. Brock has failed to point to any drastic change in the performance required under the subject contract that might support his assertion of a cardinal change.

First, the defective TDP cannot form the basis of a cardinal-change claim because Mr. Brock was not only granted a waiver from compliance with the defective specifications, but was also compensated for any additional costs incurred as a result of the defective specifications and government-caused delays. Indeed, as discussed above, Mr. Brock expressly released the government from liability for any further claims based on those defects or related delays caused by the government. Second, the government's assertion that it is not obligated to purchase any flight rigging sets in the out-years of the contract cannot form the basis of a breach claim based on a cardinal change, as Mr. Brock appears to assert. It is clear that the government was not required to purchase any flight rigging sets beyond the minimum of 475 units during the first year of performance. The government estimate of the number of units subject to purchase by the government during each of the out-years of the contract was just that – an estimate in the event defendant chose to purchase more units. Indeed, the contract itself states that "[t]he estimated quantities listed herein does [*sic*] not commit the Government to order that or any quantity above the minimum quantity." Def.'s App. at 7. Mr. Brock may have had a subjective expectation that the government would order 256 units in each out-year of the contract, but that expectation was inconsistent with the clear terms of the contract. For that reason, the government's decision to limit its purchases to the minimum quantity denoted in the contract cannot be viewed as a cardinal change to that contract.

4. Fourth Claim: $135,000

Mr. Brock also asserts that he submitted a claim to the contracting officer demanding $135,000. Compl. ¶ 16. The second amended complaint states that this claim was based on the contracting officer's failure to consider evidence provided to her by Mr. Brock and her failure to recuse herself after Mr. Brock

demanded that she do so. The SF-95 on which the claim was presented to the government refers to bad faith and a denial of procedural and substantive due process. Pl.'s 1st Resp. Ex. E. To the extent that the $135,000 claim is based on the Due Process Clause, it is beyond this court's jurisdiction, as discussed above. *See, e.g.*, *LeBlanc*, 50 F.3d at 1028. Mr. Brock's allegations of bad faith also fail, for the reasons discussed above.

To the extent that the $135,000 claim is based on the faulty specifications in the TDP or the delays caused by those specifications, the claim is barred under the doctrine of accord and satisfaction because Mr. Brock has released the government from any and all liability based on the defective specifications and resulting delay. For that reason, the government is entitled to summary judgment on that claim.

5. Fifth Claim: $239,000

Mr. Brock states that he submitted another claim to the contracting officer, in which he demanded $239,000 for defective specifications in the TDP that resulted in a government-caused delay of performance. Compl. ¶ 17. While the second amended complaint refers to a claim for $239,000, it appears that the reference relates to a claim for $232,000 which was filed on March 3, 2011, *see* Pl.'s 1st Resp. Ex. F, and was denied by the contracting officer on March 14, 2011, Def.'s App. at 114-15. That claim accuses the government of bad faith and appears to be based on the contracting officer's denial of an even earlier claim for $465,000.

The court has already held that Mr. Brock has failed to meet his burden with respect to any allegations of bad faith. And as discussed above, any CDA claims based on increased costs due to the defective specifications contained in the TDP are barred under the doctrine of accord and satisfaction. For that reason, the government is entitled to summary judgment with respect to the $239,000 claim.

6. Sixth Claim: $3.5 million

Mr. Brock asserts that he submitted a claim demanding $3.5 million based on the AMCOM ombudsman's failure to take action on Mr. Brock's allegations of misconduct on the part of various government officials. Compl. ¶ 18. The claim, which was filed in February 2011 for the amount of $3.7 million, is based on the

alleged "negligence," "negligent supervision," and "discrimination" of the ombudsman. Pl.'s 1st Resp. Ex. N. Because these allegations either sound in tort or are based upon constitutional provisions that are beyond the court's jurisdiction, this first $3.5 million claim must be dismissed under RCFC 12(b)(1).

7. Seventh Claim: $3.5 million

Finally, Mr. Brock alleges that he submitted a second claim for $3.5 million to the contracting officer, which was based on the allegedly wrongful termination of the subject contract for default. Compl. ¶ 19. The government concedes that this claim is within this court's subject matter jurisdiction, but further argues that the termination of the subject contract was entirely proper. The court agrees.

While the government has the burden of establishing that its termination of the subject contract for default was justified by an actual default on the part of Mr. Brock, *see, e.g.*, *Lisbon Contractors, Inc. v. United States*, 828 F.2d 759, 765 (Fed. Cir. 1987), there is no question that it has satisfied that burden here. Under the contract, which incorporated FAR 52.249-8, *see* Def.'s App. at 21, the contracting officer was authorized to terminate the contract for default if plaintiff failed to "[d]eliver the supplies or to perform the services within the time specified in this contract or any extension[.]" 48 C.F.R. § 52.249-8(a)(1)(i) (2011). Further, the contract also authorized, through its incorporation of FAR 52.249-8, a termination for default if plaintiff failed to "make progress, so as to endanger performance" of the contract. 48 C.F.R. § 52.249-8(a)(1)(ii) (2011).

The initial contract required Mr. Brock to supply the government with 475 flight rigging sets during the first year of performance, *id.* at 7-12, and that schedule was amended on multiple occasions in an effort to afford Mr. Brock additional time to complete delivery of the required units, *id.* at 37-39, 44-46, 101. As of July 27, 2009, plaintiff had provided only 191 units, Tipton Decl. ¶ 12, and despite numerous entreaties by defendant over the course of more than two years, Def.'s App. at 73, 85-86, 90, 94, 99-101, 108, Mr. Brock refused to provide the additional 284 rigging sets owed under the contract, *id.* at 87, 91, 95-96, 105, 109-11. At an established price of $349 per unit, plaintiff was originally owed $66,659.00 for the 191 rigging units that he provided. However, as a result of claims filed for defective specifications and delay, the government agreed to pay Mr. Brock an additional $120,646.16 in equitable adjustments under the contract.

The United States has thus paid a total of $187,305.16 for 191 rigging units and therefore, instead of the original set price of $349 per unit, the government has ultimately paid Mr. Brock approximately $980 per unit.

The propriety of the equitable adjustments and the government's payment of nearly triple the contract amount for the 191 units, fortunately, are not issues before this court. What the court does have before it is this plaintiff's breach of contract claim for the government's decision to terminate Mr. Brock's contract for default under the circumstances outlined above. Mr. Brock's steadfast refusal to deliver the remaining units in the face of the government's repeated efforts to convince him to produce the rigging sets required by the contract reflect plaintiff's repudiation of that contract and a clear justification for termination of the contract for default. *See Danzig v. AEC Corp.*, 224 F.3d 1333, 1339-40 (Fed. Cir. 2000) (holding that a contractor's failure to provide assurances of timely performance was a breach that justified the government's termination of the contract for default).

CONCLUSION

Accordingly, it is hereby **ORDERED** that

(1) Defendant's Motion for Partial Dismissal and for Summary Judgment, filed January 6, 2012, is **GRANTED**;

(2) The Clerk's Office is directed to **ENTER** final judgment in favor of defendant, **DISMISSING** the complaint as follows:

(a) The constitutional claims (with the exception of the claim based on the Takings Clause), tort claims, criminal claims, antitrust claims, the $23 million CDA claim, the $12.5 million CDA claim, and the first $3.5 million CDA claim shall be dismissed under RCFC 12(b)(1) for lack of subject matter jurisdiction, without prejudice;

(b) The takings claim shall be dismissed under RCFC 12(b)(6) for failure to state a claim, with prejudice; and

(c) The $465,000 CDA claim, the $135,000 CDA claim, the $232,000 CDA claim, and the second $3.5 million CDA claim shall be dismissed under RCFC 56, with prejudice.

(3) No costs.

LYNN J. BUSH
Judge