UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA, ex rel.
MARY J. PATZER and PETER CIMMA,
Plaintiffs,

v. **Case No. 11-C-0560**

SIKORSKY AIRCRAFT CORPORATION,
SIKORSKY SUPPORT SERVICES, INC., and
DERCO AEROSPACE, INC.,
Defendants.

DECISION AND ORDER

The United States alleges that defendant Sikorsky Support Services, Inc. ("SSSI") breached its contract with the Navy and violated the False Claims Act ("FCA") by subcontracting with its affiliate, defendant Derco Aerospace, Inc., on a cost-plus-a-percentage-of-cost ("CPPC") basis. Before me now are the parties' motions to exclude the expert testimony of certain witnesses

I. BACKGROUND

I have described the extensive facts and procedural history of this case in prior orders. *See, e.g., United States ex rel. Patzer v. Sikorsky Aircraft Corp.*, No. 11-C-560, 2023 WL 6883637 (E.D. Wis. Oct. 17, 2023). In a nutshell, the case arises out of a contract between the United States Navy and SSSI that was in force between 2006 and 2013. Under the contract, SSSI agreed to maintain the Navy's T-34/T-44 trainer aircraft at specific Navy airfields. To obtain the parts and materials it would need to make repairs, SSSI entered into a subcontract with its affiliate, Derco. Under the subcontract, Derco agreed to source parts from third-party vendors and provide them to SSSI's

maintenance personnel at the airfields. SSSI and Derco agreed that Derco would charge SSSI for the parts by adding a 32% markup to the cost of each part as reflected on Derco's invoice to its vendor. Under SSSI's contract with the Navy, SSSI was entitled to be reimbursed for the cost of parts and materials. Thus, after SSSI paid Derco's invoice, SSSI submitted a voucher to the Navy for reimbursement of the full price paid to Derco, plus an additional percentage that represented SSSI's general-and-administrative ("G&A") rate. In addition to sourcing parts and materials, Derco agreed, in its subcontract with SSSI, to staff certain on-site positions at the airfields relating to logistics support. SSSI, in its contract with the Navy, had agreed to provide these on-site logistics services in exchange for the Navy's paying a fixed price.

In this suit, the government claims that SSSI's subcontract with Derco violated the federal rule against contracting on a CPPC basis. In a prior ruling on the parties' motions for summary judgment, I agreed with the government. *See United States ex rel. Patzer v. Sikorsky Aircraft Corp.*, 571 F. Supp. 3d 979 (E.D. Wis. 2021). As a result of the CPPC violation, SSSI is liable for breaching its contract with the Navy, which specifically prohibited CPPC subcontracting. In addition, the government contends that every time SSSI submitted a voucher seeking reimbursement for goods procured on a CPPC basis, it submitted a false claim in violation of the FCA. In another prior ruling, I granted partial summary judgment to the government on the issue of liability for breach of contract, and on the issues of whether the vouchers were false claims and whether SSSI's nondisclosure of the CPPC violation satisfied the FCA's materiality element. *See Patzer*, 2023 WL 6883637, at *12–14. In the same order, I set forth how the government's damages would be measured at trial for purposes of both the contact and

FCA claims. I determined that, because the ordinary remedy in a CPPC case is to declare the contract void but allow the contractor to recover in *quantum meruit* the value of the goods and services provided, the measure of the government's damages would be the difference between what the government paid to SSSI and what SSSI could have recovered in a claim for *quantum meruit*. *Id.* at *23. However, I noted an additional wrinkle that affects the measurement of SSSI's *quantum meruit* recovery. Because SSSI agreed to provide on-site logistics support to the Navy in exchange for a fixed price, SSSI could not include in its claim for *quantum meruit* the value of any on-site logistics services that Derco provided to SSSI and the Navy.

In light of my prior rulings, the trial will involve two key issues. The first involves the FCA's scienter element. The question will be whether, at the time the vouchers were submitted to the government, the relevant decisionmakers at SSSI and Derco knew—or recklessly disregarded the risk—that the subcontract amounted to an illegal CPPC agreement. The second key question will be the amount of the government's damages.

Before me now are five motions to exclude testimony by certain of the parties' expert witnesses: (1) defense expert Patrick McGeehin, (2) defense expert Garry Richey, (3) government expert Joel Lesch, (4) government rebuttal expert Janice Muskopf, and (5) government rebuttal expert Brandi Hall. These witnesses intend to testify on various aspects of the scienter and damages issues. I will begin by discussing the government's motion to exclude defense expert McGeehin. Because the government intends to offer the testimony of Muskopf and Hall to rebut McGeehin's testimony, I next discuss defendants' motions to exclude Muskopf and Hall. I will then

turn to the government's motion to exclude Richey and will close with defendants' motion to exclude Lesch.

II. PATRICK McGEEHIN

A. Background

McGeehin is a Certified Public Accountant with expertise in government contracting. He holds an M.B.A. in Procurement and Contracting from George Washington University and has worked in the government-contracts industry for more than 45 years. McGeehin intends to testify about the industry's knowledge of CPPC contracting, which defendants contend is relevant to scienter. McGeehin also intends to offer opinions designed to show that the government suffered no or minimal damages from the CPPC violation. The government moves to exclude all of McGeehin's testimony.

B. Procedural Objection

The government first contends that defendants should be precluded from using McGeehin as a witness under Federal Rule of Civil Procedure 37(c)(1) because they failed to timely disclose his "qualifications" as required by Rule 26(a)(2)(B)(iv). The government does not contend that defendants failed to provide a general summary of McGeehin's qualifications or failed to provide the only specific qualification mentioned in the rule—a list of all publications authored in the last 10 years. Instead, the government contends that defendants failed to disclose specific facts about McGeehin's background in CPPC contracting. The main fact is McGeehin's participation in prior litigation involving such contracting, *United States ex rel. Becker v. Tools & Metals, Inc*. In this prior litigation, McGeehin submitted a declaration (the "*Becker* declaration") in which he

opined that a contract at issue in the case did not violate federal rules against CPPC contracting. (ECF No. 272–5.) The government regards this declaration as part of McGeehin's "qualifications." In addition, the government notes that McGeehin stated in the *Becker* declaration that he was familiar with CPPC contracting from his "educational training, experience, and lecturing experience." (*Id.* ¶ 5.) The government contends that whatever McGeehin had in mind when he listed his "experience" and "lecturing experience" also counts as a "qualification" that defendants should have disclosed under Rule 26.

Initially, I find that the *Becker* declaration is not a "qualification" for purposes of Rule 26(a)(2)(B)(iv). Rule 26 has a separate subdivision that requires disclosure of prior litigation in which the individual served as an expert witness. *See* Rule 26(a)(2)(B)(v). Thus, the rule distinguishes between qualifications, on the one hand, and prior litigation experience, on the other. Further, the only prior litigation experience that must be disclosed is a list of cases in which, during the last four years, the witness testified as an expert at trial or by deposition. *Id.* McGeehin's participation in the *Becker* case occurred outside of this four-year window, so Rule 26 did not require the declaration's disclosure.

This leaves McGeehin's prior "experience" and "lecturing experiences" involving CPPC contracting. These might be qualifications, but I conclude that nothing in Rule 26 requires a witness to provide this level of detail about his qualifications. For a witness in a professional discipline such as accounting and government contracting, the relevant "qualifications" referred to in the rule are things one might include on a resume or *curriculum vitae*. Generally, this will include the witness's formal education, a general description of his work in the field, and any certifications, honors, or awards received.

Nothing in the rule suggests that the witness must disclose every last item of experience or training that might be regarded as a "qualification." Nor has the government cited cases supporting its position that such detail is required. Although the government has cited two cases in which a court excluded a witness for failing to disclose his qualifications, *see Ferrando v. Krause, Inc.*, No. 02-CV-241, 2006 WL 5325731 (D. Nev. Aug. 16, 2006); *Rivera Pomales v. Bridgestone Firestone, Inc.*, 217 F.R.D. 290 (D.P.R. 2003), neither found a Rule 26 violation based on the witness's failure to disclose a *specific* qualification that the other party regarded as significant. Instead, in each case, the witness was excluded because he had failed to disclose any qualifications at all. *See Ferrando*, 2006 WL 5325731, at *1 (deeming expert disclosure deficient due to, among other things, expert report's "complete failure to provide any statement of [the witness's] qualifications"); *Rivera Pomales*, 217 F.R.D. at 291–92 (excluding an expert witness because the party failed to disclose the witness's *curriculum vitae* or any other information about the witness's qualifications). Here, McGeehin attached his resume to his report and provided a page-long narrative summary of his qualifications in the report itself. (ECF No. 260-19.) Because that is all that Rule 26(a)(2)(B) required, McGeehin's testimony is not subject to the sanction of exclusion under Rule 37(c)(1).

In any event, even if defendants were required to disclose McGeehin's prior involvement in CPPC litigation and his CPPC-specific experience, I would find their failure to disclose substantially justified. *See* Fed. R. Civ. P. 37(c)(1) (sanction of exclusion does not apply if court finds that the failure to disclose was substantially justified or is harmless). As discussed, neither the text of Rule 26 nor the cases make clear that a party must disclose more than the witness's general qualifications, such as

those that might appear on a resume or *curriculum vitae*. Thus, at the time defendants made their disclosures, they would have had no reason to think that disclosure of McGeehin's prior declaration, CPPC experience, or CPPC lecturing experience was required. Accordingly, I would not impose the sanction of exclusion even if such disclosure was required.

C. Objections Based on the Rules of Evidence

The government next moves to exclude certain of McGeehin's opinions under the Federal Rules of Evidence. I address each opinion in turn.

1. Opinions regarding industry understanding of CPPC contracting

McGeehin holds the opinion that the subcontracting arrangement between Derco and SSSI was "not the type of arrangement typically thought of in the industry as CPPC." (McGeehin Report ¶ 8, ECF No. 260-19.) McGeehin opines that because the arrangement involved Derco adding a predetermined percentage markup to its estimated costs rather than to its actual costs, a typical participant in the government-contracting industry would not think that the arrangement was CPPC. (*Id.*) In my decision holding that the arrangement amounted to CPPC contracting, I rejected defendants' argument that Derco added a predetermined markup to its estimated costs. Instead, I found that the so-called "estimates"—the prices entered on Derco's purchase orders to its vendors for the parts—were functionally identical to actual costs. *Patzer*, 571 F. Supp. 3d at 990–93.

Although McGeehin's opinion conflicts with my legal conclusion, defendants do not intend to offer the opinion to support the proposition that the arrangement was not CPPC. Instead, they intend to offer it to show that, due to the prevailing knowledge in

the industry, the relevant decisionmakers at SSSI and Derco could have reasonably—though mistakenly—believed that adding a predetermined markup to Derco's purchase-order prices resulted in a permissible, non-CPPC arrangement. This, of course, would be relevant to the scienter element of the government's FCA claims. And the Seventh Circuit has held that expert testimony regarding industry knowledge is generally admissible to negate the scienter element of fraud-based claims. *See Goldberg v. 401 N. Wabash Venture LLC*, 755 F.3d 456, 461–62 (7th Cir. 2014).

The government contends that I should exclude this opinion for three reasons. First, it contends that the opinion is irrelevant and therefore inadmissible under Federal Rule of Evidence 402. Here, the government's position is based on the Supreme Court's recent decision in *United States ex rel. Schutte v. SuperValu Inc.*, __ U.S. __, 143 S.Ct. 1391 (2023). In that case, the Court rejected the argument that a defendant could avoid liability under the FCA for submitting a claim that it subjectively believed was false if the law was sufficiently unclear that some other defendant could have reasonably believed that the claim was true. *Id.* at 1395. The government contends that McGeehin's opinion, which he formulated pre-*Schutte*, was intended to provide a reasonable interpretation of the CPPC prohibition that would prevent a finding of scienter even if defendants subjectively believed that the subcontractual arrangement between SSSI and Derco was CPPC. However, even if that may have been defendants intent at the time, McGeehin's opinion remains relevant to the question of whether, in the first place, defendants subjectively believed that they had entered into a CPPC arrangement. If, as McGeehin opines, a typical participant in the government-contracting industry would not have thought that the arrangement was CPPC, then it is

more probable that defendants' witnesses are telling the truth when they testify that they did not think that they had entered into such an arrangement.[1]

The government also notes that the FCA's scienter element can be satisfied though proof that defendants deliberately or recklessly disregarded the risk that their arrangement was CPPC. *See* 31 U.S.C. § 3729(b)(1)(A)(ii)–(iii). The government seems to be implying that, because there is evidence that defendants acted recklessly or with deliberate ignorance, McGeehin's opinion is irrelevant. However, at this point, proving scienter through proof of "actual knowledge," *see id.* § 3729(b)(1)(A)(i), is not off the table, and McGeehin's opinion is clearly relevant to that form of scienter. Moreover, evidence that industry participants would not regard the arrangement as CPPC is relevant to whether defendants acted with deliberate ignorance or reckless disregard. If defendants acted consistently with industry practice, then it is less likely that they acted with these culpable mental states.

The government next contends that, even if McGeehin's opinion is relevant, it should be excluded under Rule 403 because any relevance would be substantially outweighed by the danger that the jury would be confused or misled. However, for the reasons just stated, McGeehin's opinion is highly relevant to scienter. Moreover, because it goes directly to a central issue in the case, I see no danger of jury confusion. Accordingly, I will not exclude the opinion under Rule 403.

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[1] McGeehin's opinion along these lines should not be confused with an opinion about a witness's state of mind, which is not permitted. *Goldberg*, 755 F.3d at 461–62. McGeehin does not intend to testify that defendants' witnesses are telling the truth or did not intend to defraud the government, only that their actions were consistent with the state of knowledge within the government-contracting industry. Such testimony is permitted. *Id.*

Finally, the government contends that McGeehin's opinion is inadmissible because it is not the product of reliable principles and methods. *See* Fed. R. Evid. 702(c). Here, the government again points to McGeehin's *Becker* declaration, and it contends that McGeehin did not follow the method he used in that declaration when forming his opinions in this case. But what the government describes as a difference in method is actually a difference in the underlying facts of each case. In *Becker*, McGeehin emphasized that the arrangement was not CPPC because, even if the parties had agreed that prices could be set by adding a percentage markup to costs, the buyer always reviewed and agreed to the seller's price before committing to purchasing the goods. (*Becker* Decl. ¶ 13.) Such an arrangement resulted in firm-fixed pricing rather than CPPC contracting. *See Patzer*, 571 F. Supp. 3d at 987–89. In the present case, SSSI and Derco never agreed on specific prices before Derco supplied the parts and materials, and therefore they did not engage in firm-fixed-price contracting. *Id.* But a contract is not CPPC simply because it is not fixed price. *Id.* at 989. Here, McGeehin opines that industry participants would not have regarded the SSSI-Derco arrangement as CPPC because Derco added the predetermined percentage to its estimated costs rather than its actual costs. (McGeehin Report ¶ 8.) This opinion is relevant even if SSSI and Derco did not agree to fixed prices, as they did in the *Becker* case, for it points to a separate reason that could negate scienter. In short, McGeehin's opinions in this case are not inconsistent with his opinions in *Becker* in a way that suggests he is using an unreliable method.

2. Opinion that P&E parts should be excluded from government's damages

McGeehin intends to opine that a small subset of parts and materials that Derco sold to SSSI after completion of a process known as "Planning and Estimating" (P&E) should be excluded from the government's damages because the Navy approved estimated prices for the parts before Derco committed to purchasing them. The government moves to exclude this opinion on the ground that it is the product of an unreliable method and is inconsistent with the facts of the case. The government's argument is that McGeehin's opinion is essentially a claim that the P&E process resulted in the creation of firm-fixed prices. The government notes that the Navy never approved any actual prices during the P&E process but only approved "not to exceed" estimates, and that therefore the resulting transactions were not fixed price.

In response to this argument, defendants state that McGeehin will not testify that parts reviewed under the P&E process were sold at fixed prices. (ECF No. 342 at 25 of 35.) Instead, he will opine that parts reviewed under this process should be "excluded from the potential pool of CPPC damages" because, by approving the estimates, the government showed that it was "comfortable with the pricing" and therefore could not have possibly overpaid for the parts. (*Id.* at 26 of 35.) But, under the formula for measuring damages set out in my prior opinions, this testimony is irrelevant. Under that formula, the jury will not be asked to determine whether the government overpaid for any specific part or parts. Rather, because of the CPPC violation, *all* of Derco's prices are now void, and whether SSSI was overpaid turns on the total value of its hypothetical *quantum meruit* recovery. *See Patzer*, 2023 WL 6883637, at *27. That is, the government's damages are the difference between what it actually paid to SSSI over

the life of the contract and what SSSI could have recovered in *quantum meruit* had it disclosed the CPPC violation. *Id.* at 25. Although the value of parts and materials are a component of the *quantum meruit* recovery, I have already ruled that such value will be measured as the amount that Derco paid to its vendors. *Id.* at 26. This ruling applies to the P&E transactions, and therefore the value of the parts subject to those transactions will be measured as the price that Derco paid for them. Accordingly, to the extent that McGeehin intends to testify that the P&E parts are somehow excludable from the government's damages pool, his opinion is inadmissible under Rule 402.

3. Opinion that the government has no damages because the DCAA determined Derco's prices were fair and reasonable

McGeehin offers the opinion that, because a report issued by the Defense Contract Audit Agency ("DCAA") once deemed Derco's prices "fair and reasonable," the government has no damages. (McGeehin Report ¶¶ 15, 99.) The government contends that this opinion is irrelevant because it conflicts with my ruling that the measure of damages will be based on the *quantum meruit* value of SSSI's performance rather than the reasonableness of Derco's prices.

I described the facts surrounding the DCAA report in a prior order. *See Patzer*, 2023 WL 6883637, at *9–10 & *28. As I explained there, the DCAA auditor was under the impression that Derco sold parts and materials to SSSI at firm-fixed prices, and her report implies that Derco's supposed fixed prices were fair and reasonable. *Patzer*, 2023 WL 6883637, at *28. However, due to the now-discovered CPPC violation, Derco's supposed fixed prices are void, and the government's damages will be determined by the value of SSSI's claim for *quantum meruit*, which consists of the value of the parts plus the value of Derco's procurement services. Thus, DCAA's conclusion

that Derco's prices were fair and reasonable does not directly bear on the value of the goods and services Derco provided.

Defendants contend that the DCAA report remains relevant after my ruling because "the natural consequence of DCAA's finding of reasonableness" is that "the amounts already paid to Derco constitute a reasonable fair market value for Derco's services." (ECF No. 342 at 27 of 35.) However, it is not obvious to me that this is a natural consequence of the report, and defendants do not explain how the DCAA auditor's opinion about the reasonableness of Derco's prices implies anything about the value of those of Derco's services that are allocable to the parts-and-materials contract lines items ("CLINs"). As I've said before, the CPPC violation rendered the prices void, and the measure of the government's damages is not based on the prices that Derco could have charged under a valid contract. *Patzer*, 2023 WL 6883637, at *27–28. Thus, it is not clear to me that the DCAA report is even relevant to the measure of damages. Still, because the question under review is the admissibility of McGeehin's opinion based on the report, and not the admissibility of the report itself, I will assume without deciding that the report is relevant evidence of the value of Derco's services.

But the same problem highlights a deficiency in McGeehin's opinion: he does not purport to apply any expertise or analysis to support his move from the premise that the report exists to the conclusion that Derco's prices equal the fair market value of SSSI's *quantum meruit* claim. The entirety of his analysis is the following: "Since the government, through its audit arm, DCAA, found that the prices charged by Derco were fair and reasonable, damages on a *quantum meruit* basis do not exist." (McGeehin Report ¶ 99.) Again, it is not clear how the report implies anything at all about the value

of Derco's services, and McGeehin does not explain how it does. For this reason, his opinion is aptly described as "opinion evidence that is connected to existing data only by the *ipse dixit* of the expert." *General Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1997). To the extent McGeehin's reasoning can be discerned, it appears to be based on a damages theory that I have rejected: that the government must prove that it paid more than the price Derco could have charged under a valid contract. (McGeehin Dep. at 289:6–289:10.) Thus, the opinion is inadmissible because it is either *ipse dixit* or based on a damages theory that SSSI cannot pursue at trial.

Although McGeehin may not opine that the report's mere existence shows that the government suffered no damages, he may still testify about the report and the nature of the DCAA audit that generated the report if the report is admitted at trial. If the report is admitted, such testimony will help the jury understand the context surrounding the report and what the report means. For example, the report does not explicitly state that Derco's prices were fair and reasonable. Instead, the report opines that SSSI's direct material costs were "allowable." (ECF No. 241-78 at 3.) But, under the federal regulation for determining allowability, a cost is allowable only if it is reasonable. *See* 48 C.F.R. § 31.201-2(a)(1). McGeehin may provide testimony that will help the jury understand defendants' argument that, because the report finds SSSI's costs allowable, it also implies that Derco's prices were reasonable. But again, he may not opine that this finding of price reasonableness implies that the value of the *quantum meruit* claim equals the entire amount that the government paid to SSSI under the vouchers.

4. Opinion that Derco's indirect costs are includable in *quantum meruit*

McGeehin opines that SSSI's claim for *quantum meruit* should include an amount that represents Derco's indirect costs that are properly allocable to the contract. (McGeehin Report ¶ 101.) The government contends that this opinion is irrelevant because it contradicts my rulings that (1) the value of the parts equals the amount that Derco paid its vendors, and (2) Derco's actual indirect costs are not an element of SSSI's *quantum meruit* recovery. However, while indirect costs are not a direct element of the *quantum meruit* recovery, Derco's indirect costs may be evidence of the value of Derco's procurement services. (ECF No. 329 at 5.) And while I've already established the value of the parts, this does not preclude defendants from arguing that Derco's properly allocable indirect costs represents the value of Derco's procurement services. Accordingly, the government's motion to exclude McGeehin's testimony on indirect costs will be denied.

5. Opinion on inclusion of profit in *quantum meruit*

McGeehin opines that, under *quantum meruit*, a contractor is entitled to a reasonable profit. (McGeehin Report ¶ 102.) He also opines that, because the DCAA report discussed above found Derco's prices reasonable, SSSI should be entitled to include Derco's targeted profit rate in its claim for *quantum meruit*, along with all the other elements that comprised Derco's pricing. The government moves to exclude these opinions. For two reasons, I agree that they are inadmissible.

First, McGeehin's opinion that a contractor is entitled to a reasonable profit in *quantum meruit* is a pure legal conclusion that is not the proper subject of expert testimony. *See Jimenez v. City of Chicago*, 732 F.3d 710, 721 (7th Cir. 2013). Second,

McGeehin's opinion that Derco's targeted profit rate is includable in SSSI's claim for *quantum meruit* is simply a repackaged version of his opinion—which I ruled inadmissible above—that the DCAA report establishes that the government has no damages. McGeehin essentially reasons that, because the DCAA found the prices reasonable, those prices represent the value of Derco's performance, and therefore any profit embedded in those prices must also be included in the claim for *quantum meruit*. However, as I explained above, McGeehin's opinion that the DCAA report implies that Derco's CPPC prices represent the value of its performance is inadmissible because it is either based on *ipse dixit* or on a damages theory that I have rejected. Therefore, McGeehin's subsidiary conclusion that the report implies that the profit embedded in Derco's prices must be subtracted from the government's damages is also inadmissible.

6. Opinion on number of unadjusted PPVs

In his report, McGeehin states that, based on his review of Derco's records, he discovered 859 parts transactions in which Derco experienced a "purchase price variance" (PPV) greater than the absolute value of $25 but did not change the amount it billed to SSSI. (McGeehin Report ¶ 76.) This opinion was intended to rebut the government's argument that the contract between SSSI and Derco was CPPC because Derco systematically adjusted its prices to SSSI to ensure that its prices always reflected its actual costs plus 32%. *See Patzer*, 571 F. Supp. 3d at 984–85. However, I determined that the arrangement between SSSI and Derco was CPPC even if the price charged to SSSI was not *exactly* Derco's cost plus 32%. *Id.* at 990–91, 94. Thus, the number of PPVs does not appear to be relevant to any issue remaining in the case.

However, on the off chance that a party intends to introduce evidence as to the number of PPVs to support an argument relating to scienter, I will address the government's substantive challenge to McGeehin's opinion. Here, the government contends that McGeehin's opinion that there were 859 unadjusted PPVs must be the product of unreliable methods because McGeehin previously submitted a declaration (ECF No. 173-49) in which he stated that there were 333. Defendants contend that the earlier declaration was not intended to be comprehensive, and that McGeehin's opinion as stated in his official Rule 26(a) report was based on a more thorough analysis of Derco's records. Defendants also contend that McGeehin's report discloses his methodology: he applied arithmetic to data contained in a spreadsheet that contained Derco's invoice prices and its purchase-order prices to identify PPVs, and then he looked for evidence that the PPVs were adjusted. (ECF No. 260-19 ¶ 746 and accompanying notes.) The government does not argue that this method, on its face, is unreliable. Rather, it argues that because McGeehin previously identified only 333 unadjusted PPVs, the court should infer that something is amiss. However, McGeehin's identifying a smaller number of PPVs in his initial declaration does not imply that his later, more thorough analysis was the product of unreliable principles and methods. Accordingly, if the opinion becomes relevant to scienter, I will not exclude it under Rule 702.

7. Testimony about Basic Ordering Agreements ("BOAs")

McGeehin intends to testify that the written agreement between SSSI and Derco—known as the "Inter-Entity Work Authorization" (IWA)—resembled what is known in the industry as a "Basic Ordering Agreement" (BOA). He intends to testify that

a BOA is commonly used when parties are unable to develop a list of firm-fixed prices at the outset of their relationship. (McGeehin Report ¶¶ 55–56.) A BOA contains contract terms intended to be incorporated into many separate, freestanding contracts that the parties will enter into over the course of their relationship. McGeehin's testimony about BOAs is relevant to scienter. The relevant decisionmakers will testify that they thought the IWA was a BOA, and that their intent was to have SSSI and Derco agree to firm-fixed prices on a transaction-by-transaction basis. If the parties had agreed to such fixed prices, then no CPPC violation would have occurred. I ruled that the IWA did not function as a BOA because the parties never agreed to prices on a transaction-by-transaction basis. *Patzer*, 571 F. Supp. 3d at 987–89. However, this ruling does not prevent defendants from arguing that they *thought* they had entered into a BOA and would later enter into separate contracts for the sale of parts and materials at fixed prices. McGeehin's testimony is intended to show that defendants had a reasonable basis for thinking that this is what they had done.

The government moves to exclude McGeehin's testimony on the ground that he is not qualified as an expert in the area of BOAs. Although the government concedes that McGeehin is an expert in the field of government contracts, it contends that he lacks any qualifications relating to BOAs specifically. They also point to McGeehin's deposition testimony in which he declined to declare himself an expert in BOAs but said he was "conversant" in them, knew what they were, and knew what they are used for. (McGeehin Dep. at 20:14–21:5.)

McGeehin's lacking a specific credential on his resume relating to BOAs does not mean he is unqualified to testify about them. Rule 702 does not require an expert to be

a specialist in the precise sub-field at issue. *See Hall v. Flannery*, 840 F.3d 922, 929 (7th Cir. 2016). Thus, even if one could earn a credential in BOAs, McGeehin's failure to have earned it would not preclude him from testifying on the subject. Moreover, McGeehin's declining to declare himself an expert does not mean that he is unqualified. It is the trial judge's role to determine whether the expert is qualified, not the expert's. *Lolie v. Ohio Brass Co.*, 502 F.2d 741, 746–47 (7th Cir. 1974). In any event, McGeehin's testimony was that he was familiar with BOAs, what they were, and what they are used for. He also testified that he has experience working with BOAs and similar types of government contracts. (McGeehin Dep. at 20:19–20:20, 22:10–22:16.) These are sufficient qualifications for purposes of admissibility. Any further challenge to McGeehin's qualifications goes to the weight of his testimony.

III. JANICE MUSKOPF

A. Background

Muskopf is the Director of Price, Cost, and Finance at the Office of the Under Secretary of Defense for Acquisition and Sustainment. She has over 30 years of experience in government contracting and has served in multiple senior contracting positions at the Department of Defense. The government intends to have Muskopf rebut McGeehin's opinions about how the Federal Acquisition Regulation ("FAR") applied to the prime contract between the Navy and SSSI and the subcontractual arrangement between SSSI and Derco. Her opinions are relevant to the issues of scienter and damages.

B. Procedural Objections

Under Federal Rule of Civil Procedure 37(c)(1), defendants move to exclude Muskopf from presenting testimony at trial due to the government's failure to properly disclose her testimony under Rule 26(a)(2)(B). Here, defendants raise two alleged deficiencies.

First, defendants contend that the government's attorneys ghostwrote Muskopf's report, and that therefore Muskopf did not "prepare[]" her report. *See* Fed. R. Civ. P. 26(a)(2)(B) (expert report must be "prepared and signed by the witness"). Muskopf testified at her deposition that counsel prepared the first draft of her report, which she then reviewed, along with the relevant underlying documents, to confirm that it represented her opinions. (Muskopf Dep. at 23:2–24:4, ECF No. 284-66.) I find that, in the context of this case, this was sufficient participation to satisfy the "prepared by" requirement. Muskopf will testify about her experience and understanding of the FAR and how it applies in this case. Her opinions involved reviewing certain of the key documents in this case—such as the IWA—and explaining how they should be treated under the applicable regulations. Because the government's attorneys are also familiar with the same regulations and documents, it was appropriate for them to assist her by preparing the first draft of her report. *See* Fed. R. Civ. P. 26(a)(2)(B) advisory committee's note to 1993 amendment (counsel may provide assistance in preparing report so long as report is "written in a manner that reflects the testimony to be given by the witness"). Muskopf is not, for example, an accident reconstructionist who must design a scientific investigation to determine causation. Because a scientific

investigation into causation is beyond counsel's expertise, such a witness would be expected to be the primary author of the report's first draft.

This, of course, does not mean that an expert witness may simply rubber-stamp counsel's opinions. The opinions must be the witness's. But any concern that the witness is parroting counsel's arguments is best addressed under Federal Rule of Evidence 702 or through cross-examination. The purpose of the written-report requirement is not to police the extent of counsel's involvement but to provide notice to the defendant of the witness's testimony. *See Metavante Corp. v. Emigrant Sav. Bank*, 619 F.3d 748, 762 (7th Cir. 2010). As explained below, Muskopf's report fulfills that purpose. Although defendants also raise the ghostwriting objection under Rule 702, Muskopf testified at her deposition that her opinions are her own. (Muskopf Dep. at 23:5–24:4.) That is sufficient to meet the gatekeeping requirements of Rule 702. Any further challenge to her independence goes to the weight of her testimony rather than its admissibility.

Defendants' second procedural objection is that Muskopf's report does not contain "a complete statement of all opinions the witness will express and the basis and reasons for them," as required by Rule 26(a)(2)(B)(i). Defendants contend that, to fulfill this requirement, Muskopf "needed to describe the documents she reviewed and identify the observations that led to her opinions." (ECF No. 334 at 13 of 26.) But Muskopf's report does this. Again, her opinions are largely based on her experience with the FAR, and Muskopf identifies each part of the regulation that applies to her opinions. (ECF 241-27 at 5–8 of 15.) She also identifies the documents that are relevant to each opinion, including the IWA and my prior opinions. Defendants complain that

Muskopf attaches to her report a list of documents that she considered but does explicitly identify the role each document played in her analysis. (*Id.* at 12–13.) However, it is evident that the listed documents served as a source of information about the facts of the case that she discusses in her opinions. Because an expert report is not a legal brief, the expert is not required to cite to the record to support every factual assertion in the report. Accordingly, Muskopf's report contained all the information necessary to fulfill Rule 26(a)(2)(B)'s notice function.

C. Objections Based on the Rules of Evidence

1. Opinion that IWA did not resemble a BOA

To rebut McGeehin's opinion that the IWA was intended to function as a BOA rather than a CPPC contract, Muskopf opines that the IWA did not satisfy certain requirements of the FAR that apply to BOAs. Defendants move to exclude this opinion as irrelevant.

Recall that McGeehin's opinion about BOAs is offered to support defendants' scienter argument. He will opine that, because industry participants could have reasonably viewed the IWA as a BOA, defendants could have reasonably believed that they had not entered into a CPPC contract. Muskopf's opinions on BOAs are relevant to the same argument, in that she intends to explain how the IWA differs from typical BOAs used in the government-contracting industry. Defendants contend, however, that the FAR provision relied on by Muskopf, FAR 16.703, does not apply to agreements between a prime contractor and a subcontractor. While that may be true, it does not make Muskopf's opinions irrelevant. The regulation at issue is the only one in the FAR that defines BOAs, and therefore it remains relevant to the question of whether

defendants thought they had entered into the kind of BOA that is ordinarily used in the government-contracting industry. Indeed, McGeehin cites to the very same regulation to support his opinion that the IWA resembled what the industry would consider a BOA. (McGeehin Report ¶ 7.) Accordingly, Muskopf's opinion that the IWA does not resemble a BOA is admissible.

2. Opinion that Derco's pricing did not resemble firm-fixed pricing because Derco retroactively changed prices

Muskopf also opines that, under the FAR, Derco's prices were not firm-fixed prices because Derco had the ability to retroactively change its billing to SSSI. Defendants argue that this opinion is irrelevant.

Muskopf's testimony appears to involve the purchase price variances ("PPVs") that I discussed in connection with the government's motion to exclude McGeehin's opinions. As I discussed there, the parties seem to agree that PPVs are no longer relevant to any issue in the case. However, this issue is conceivably relevant to scienter. If defendants intend to argue against a finding of scienter by claiming that they thought that Derco was selling to SSSI at firm-fixed prices, then the government may rebut this claim by attempting to show that defendants knew that Derco was retroactively adjusting its prices. If the government produces evidence along these lines, then Muskopf's opinion that, under the FAR, such retroactive adjustments are inconsistent with firm-fixed pricing would be relevant.

Defendants claim that the government has no evidence that any of the relevant decisionmakers at SSSI and Derco knew about the price adjustments. However, it is premature to draw conclusions about what the evidence might show. If at trial the government produces no evidence from which the jury could reasonably find that a

decisionmaker knew of the adjustments, then Muskopf's testimony about the adjustments will be excluded as irrelevant.

3. Opinions that P&E process did not result in firm-fixed prices

Muskopf intends to rebut McGeehin's testimony that parts and materials sold through the planning-and-estimating ("P&E") process were sold at firm-fixed prices. As I discussed above, defendants now state that McGeehin will not opine that the P&E process resulted in firm-fixed prices. Defendants contend that therefore Muskopf's mirror-image opinion is not relevant. The government concedes that if McGeehin does not opine that the P&E process resulted in firm-fixed prices, then they will not offer Muskopf's contrary opinion. Thus, this issue appears to be moot. However, I note that if defendants elicit testimony from McGeehin implying that the P&E process resulted in firm-fixed prices, Muskopf will be permitted to offer her rebuttal opinion.

4. Opinion regarding logistics services and chargeback claims

In its complaint, the government brought claims against defendants alleging that they had agreed to labor "chargebacks" for logistics services that resulted in Derco's discounting its prices to SSSI. The government claimed that SSSI should have passed those discounts on to the government. I granted summary judgment to the defendants on the chargeback claims, *Patzer*, 2023 WL 68836374, at *30–31, and they are not relevant to any issue that remains for trial. Because the parties made their expert disclosures before I granted summary judgment on the chargeback claims, both McGeehin and Muskopf disclosed opinions relating to those claims. However, defendants have since withdrawn McGeehin's chargeback opinions, and they contend that Muskopf's rebuttal opinions are now irrelevant. The government does not dispute

that Muskopf's opinions were intended to rebut McGeehin's chargeback opinions and that her rebuttal opinions are no longer necessary. Thus, this issue appears to be moot.

However, the parties' briefs touch on the question of whether McGeehin will opine about logistics services outside the context of the chargebacks. The government contends that if McGeehin is permitted to testify about logistics services, then Muskopf should be allowed to rebut his testimony, provided that her testimony is within the scope of the opinions she disclosed in her report. At this point, these issues have not been adequately briefed. The government has not identified any specific opinion by McGeehin that Muskopf might rebut, and therefore I cannot determine whether Muskopf's disclosed opinions would be relevant rebuttal material. Accordingly, I will address this issue at trial, if necessary.

5. Opinions regarding price reasonableness

As discussed above, McGeehin intends to testify about the DCAA report that implicitly found Derco's prices fair and reasonable. Although I will not allow McGeehin to opine that this finding means that the government has no damages, I will allow him to testify about the audit process and explain the technical aspects of the report to the jury.

On the topic of the reasonableness of Derco's prices, Muskopf intends to testify that SSSI did not fulfill its contractual and regulatory duties to ensure that it was acquiring parts and materials at the most advantageous prices available. Defendants contend that such testimony is irrelevant because the government has not brought a claim based on SSSI's breach of these duties. However, even without such a claim, Muskopf's testimony is relevant to rebutting defendants' argument that, despite the CPPC violation, Derco's prices were reasonable. If the government shows that SSSI

was lax in its review of Derco's pricing when it had a duty to be vigilant, then it is less probable that Derco's prices reflect the fair value of its performance. Accordingly, Muskopf's testimony on the topic of price reasonableness is admissible.

6. Opinions regarding commerciality

In a prior order, I discussed the FAR requirement of "commerciality" and its relevance to this case. *Patzer*, 2023 WL 6883637, at *4–5, 9–10. In short, that requirement is tangentially relevant to this case because it was a focus of the DCAA audit that resulted in the implied finding that Derco's prices were fair and reasonable. Muskopf intends to testify that only a contracting officer has authority under the FAR to deem items or services commercial, and that no contracting officer determined that Derco's items or services were commercial. Defendants argue that this opinion is not relevant to any issue left in the case.

Although the issue of whether Derco's items and services were commercial is not at issue in this case, the concept of commerciality is still relevant because that was the subject of the DCAA report. The government may argue that the jury should assign less weight to the report's conclusions about Derco's pricing because the focus of the audit was commerciality rather than price reasonableness. Moreover, the government may show that the report was advisory only, and that a contracting officer must make final determinations on matters such as allowability and commerciality. Muskopf's testimony that only a contracting officer may determine commerciality is relevant to these issues.

IV. BRANDI HALL

A. Background

Hall is the Technical Program Chief of the Central Region of the DCAA and has nineteen years of DCAA auditing experience. The government intends to have her rebut certain of McGeehin's opinions on damages.

B. Procedural Objections

Defendants raise the same two Rule 26 objections to Hall's testimony as they did to Muskopf's: (1) Hall did not "prepare[]" her own report because the government ghostwrote the first draft, and (2) Hall's report is not "complete" because she does not precisely explain how the documents she reviewed support her opinions. I will overrule these objections for the same reasons I gave with respect to Muskopf. As to the first objection, counsel is permitted to assist a witness in preparing her report so long as the report accurately reflects the witness's testimony. Hall's lengthy deposition testimony (ECF No. 284-67), in which she was able to discuss her report, shows that the report reflects her own opinions and testimony. To the extent defendants believe that Hall is merely parroting counsel's opinions and therefore her testimony is entitled to less weight, they may bring out the relevant facts during cross-examination.[2] As to the second objection, the report identifies Hall's testimony and discusses the FAR provisions and key documents on which her testimony is based. (ECF No. 241-48 at 8–9 of 17.) Hall's failure to specifically discuss in the body of her report the additional documents listed in an attachment does not render her report incomplete.

[2] This ruling also applies to defendants' duplicative ghostwriting objection under Rule 702. (ECF No. 336 at 19–20 of 25.)

C. Objections Based on the Rules of Evidence

1. Testimony about fixed-price and cost-reimbursable government contracts

One area of Hall's testimony involves the difference between fixed-price and cost-reimbursable government contracts and how this difference relates to the concept of indirect costs. After noting that the FAR recognizes these two general categories of contracts, Hall explains that a contractor's actual indirect costs are reimbursable only under a cost-reimbursable contract. Hall then opines that because the IWA was not a cost-reimbursable contract, Derco was not entitled to reimbursement of its indirect costs.

Hall's testimony responds to McGeehin's testimony about indirect costs. As explained above, McGeehin may testify that Derco's indirect costs represent the value of the administrative aspects of its procurement services and should therefore be included in the measure of SSSI's *quantum meruit* recovery. Although Hall does not opine that indirect costs should be excluded from that recovery, she makes the point that, because Derco wasn't operating under a cost-reimbursable contract, it was not guaranteed to receive reimbursement for its indirect costs. Defendants contend that this point is irrelevant. I disagree. If McGeehin opines that Derco's indirect costs serve as a proxy for the fair market value of Derco's procurement services, Hall may testify about how indirect costs are normally treated in government contracting. Not only will this provide additional context to assist the jury in understanding whether indirect costs are an appropriate measure of the value of Derco's services, it will prevent the jury from erroneously concluding that SSSI entered into an agreement with Derco in which it promised to reimburse Derco for its actual indirect costs.

2. Opinion on allocability of Derco's indirect costs

Hall's remaining testimony concerns the rules for reimbursing indirect costs under a cost-reimbursable contract. She observes that, under the FAR and Cost Accounting Standards ("CAS"), indirect costs are reimbursable only to the extent that the overhead and other expenses that make up the costs benefit the contract. Further, a contractor may recover only the proportion of its indirect costs that benefited the cost-reimbursable contract. Hall states in her report that many of the overhead expenses Derco identified in its CAS Disclosure Statement—purchasing, traffic, receiving and inspection, packaging and shipping, and warehousing/inventory operations—were performed by on-site personnel at the airfields rather than by Derco. Based on this comparison of Derco's disclosure statement to the facts of this case, Hall opines that "very few if any of the material overhead costs disclosed in Derco's CAS Disclosure Statement provided any benefit to the T-34/T-44 contracts," and that "recovering those indirect costs in equal proportion to the T-34/T-44 material purchases is an inequitable allocation of indirect costs that should not [be] permitted under the FAR or CAS." (ECF No. 241-28 at 9 of 17.) Defendants move to exclude this opinion under Rule 702 on the ground that it is not not based on sufficient facts or data and is not the product of reliable principles and methods.

Regarding sufficient facts or data, defendants point out that Hall entirely ignores two categories of Derco's disclosed material overhead: quality assurance and home office expenses. (CAS Disclosure Statement § 4.1.0, ECF No. 241-83.) Defendants also point out that Hall conceded at her deposition that home offices expenses accounted for the majority of Derco's indirect costs. (Hall Dep. at 73:18–74:4, ECF No. 284-67.) Thus,

defendants argue, Hall had no basis for concluding that "very few, if any" of Derco's disclosed material overhead costs benefited the contract. The government does not dispute that Hall failed to consider all categories of costs listed in the CAS disclosure statement. Instead, they contend that it was appropriate for her to do so because Hall was responding to McGeehin's opinion that "Derco could recover *all* of its actual indirect costs without looking at *any* of the categories to see if they benefited the T-34/T-44 contract." (ECF No. 346 at 16–17 of 18.) However, McGeehin does not actually offer that opinion. Instead, he opines that Derco should recover "the indirect costs *allocable to the Contract* under the established SSSI and Derco accounting systems." (McGeehin Report ¶ 101 (emphasis added).) In any event, putting McGeehin's opinion to one side, there is still the question of how Hall could have concluded that "very few, if any" of Derco's disclosed material overhead costs benefitted the contract when she failed to consider two entire categories of disclosed costs. Because the government does not explain how this conclusion is supported by sufficient facts or data, defendants' motion to exclude it will be granted.[3]

Nonetheless, Hall's testimony about indirect costs is not limited to this opinion. She also discusses the general principles behind allocating indirect costs under the FAR and CAS. To the extent that these principles would help the jury understand the parties' arguments about whether some calculation of Derco's indirect costs represents the fair value of the procurement services includable in SSSI's claim for *quantum meruit*, Hall may testify about them.

[3] Because Hall's opinion must be excluded because it is not based on sufficient facts or data, I do not separately consider defendants' argument that the same opinion is not the product of reliable principles and methods.

V. GARRY RICHEY

A. Background

Richey is a former civil employee of the Department of Defense with over forty years of experience in aircraft support logistics. He held a series of relevant positions at Tinker Air Force Base, including Deputy Chief of Contractor Logistics Support, where he oversaw contract support for nearly the entire United States Air Force. He also served as the Executive Director of the Oklahoma City Air Logistics Center, where he was responsible for leading depot maintenance and logistics efforts.

Defendants intend to have Richey provide an overview of military logistics and describe aspects of Derco's support services on the T-34/T-44 Program. In addition to describing Derco's work, he intends to opine that Derco's performance "met or exceeded" contract requirements and industry norms. (Richey Report at 48, ECF No. 260-28.) According to defendants, this testimony is relevant to establishing that Derco's services provided value to the Navy and therefore should be included in SSSI's hypothetical claim for *quantum meruit*. Such value, in turn, should be deducted from the government's damages. However, Richey does not assign a specific dollar value to Derco's services.

The government moves to exclude Richey's testimony for two general reasons. First, the government contends that his testimony is not relevant because it focuses on Derco's on-site support services, which, under my prior opinions, are not includable in the *quantum meruit* claim. Second, the government contends that, even if Richey's testimony is relevant to the *quantum meruit* claim, his opinions about the quality of Derco's services are either unhelpful or unreliable. As to helpfulness, the government

notes that Richey's opinions about the quality of Derco's work are based on performance reviews completed by government officials. The government contends that because those officials are available to testify and the jury is capable of understanding their testimony without the aid of an expert, Richey's opinions are unhelpful. As to reliability, the government contends that Richey's opinions about the quality of Derco's work is not based on any consistent methodology and is not supported by sufficient facts or data.

B. Analysis

In prior orders, I described the services that are includable in SSSI's hypothetical *quantum meruit* claim as "procurement services." *See* ECF No. 329 at 9. However, the term "procurement services" is an umbrella term that applies to a subset of the many specific services that Derco provided. Up to this point, I have not comprehensively identified the specific services that fit under this umbrella. Nonetheless, I have identified two categories of services that are *not* includable in the *quantum meruit* claim. First, any Derco service that fulfilled SSSI's on-site support obligations, as specified in in Section 4 of the Performance Work Statement ("PWS") attached to the prime contracts (ECF No. 322-1), is not includable in the *quantum meruit* claim. Second, any work actually performed by the on-site support staff—including any procurement service performed by such staff—is not includable in the *quantum meruit* claim. Because the jury will not be asked to value Derco's on-site support services, to the extent that Richey's testimony concerns those services, it is not relevant.

In his report, Richey discusses eleven types of services that Derco provided to SSSI and the Navy. (Richey Report at 13.) Below, I discuss these eleven categories

and identify those that are includable in SSSI's claim for *quantum meruit* and those that are not.[4] Richey's testimony about categories that are not includable will be excluded as irrelevant. For those categories that are relevant, I will also discuss the government's substantive objections to Richey's opinions about the quality of Derco's work.

1. Relevance

(1) Derco identified required components. Richey generally describes these services as "determin[ing] what parts are on hand, which parts to acquire, and which quantities are necessary to (i) meet flight mission demands, (ii) achieve economies, and (iii) create lead-time efficiencies." (Richey Report at 14.) These services relate to "managing" the government's parts inventory, which, as I explained in a prior order, is a task within the scope of § 4.30 of the PWS. (ECF No. 329 at 10.) More specifically, these services fall within two subparts of § 4.30. The first is § 4.30.1.1, which states in relevant part as follows:

> The Contractor shall conduct an in-depth analysis of the Government provided inventory, and make required changes to maximize the efficiency and cost effectiveness of the inventory with particular emphasis placed on reducing excess, eliminating unnecessary repair actions which create an overstock condition, improving repair/replenishment pipelines, and reducing overall material costs.

The second is § 4.30.1.3, which provides in relevant part as follows: "The Contractor is responsible for maintaining, on hand, an adequate quantity of [ready for issue] assets to support the T-34 and T-44 aircraft inventory, flight hours and readiness objectives." Richey cites to these parts of the PWS in his report when describing the services he is

[4] The question of allocability presents a question of law for the court. *See Hanover Ins. Co. v. N. Bldg. Co.*, 751 F.3d 788, 791 (7th Cir 2014) ("[C]ontract interpretation is a question of law."); *Teknowledge Corp. v. United States*, 85 Fed. Cl. 235, 238 (2009) (explaining that the question of allocability is "a purely legal question . . . ripe for resolution by summary judgment").

opining about. (Richey Report at 14–15 & n.55 (citing PWS § 4.30.1.1), 18 (citing PWS § 4.30.1.3).) Accordingly, because these services fall within Section 4 of the PWS, Richey's testimony about them is inadmissible as irrelevant.

(2) Identifying Sources of Components and Qualified Vendors. Richey generally describes these services as follows: "To obtain the necessary components for the Program, Derco also identified qualified sources of parts and materials in the marketplace, selected the appropriate source using a 'best value' approach, and regularly evaluated supplier performance using established standards." (Richey Report at 22.) These services are the kinds of procurement services that fall under the CLINs for parts and material. *See* ECF No. 260-1 at 517 ("[t]he Contractor shall provide through FAA approved sources, services and material for repair, replacement or overhaul of components and parts and subscription services required to support CLIN's."). Although it is possible that some or all of these services were performed by on-site personnel and are excludable from the *quantum meruit* claim for that reason, the extent of on-site staff's involvement presents a fact question for trial. Accordingly, Richey's testimony about this category of services is relevant.

(3) Determining whether to purchase or repair components. These services are excludable from the *quantum meruit* claim because they fall within Section 4 of the PWS. More specifically, several subparts of § 4.30.1.3 required on-site support personnel to make decisions about whether to repair or replace certain components. Richey cites one such subpart in this section of his report to identify the services at issue. *See* Richey Report at 25 & n.100 (citing PWS § 4.30.1.3.11).) Richey also cites the entirety of § 4.30.1.2 of the PWS to identify other services within the scope of this

part of his testimony. (*Id.* at 26 & n.107.) Accordingly, Richey's testimony on this topic is inadmissible as irrelevant.

(4) Storing required inventory. Storage services are excludable from the *quantum meruit* claim because they fall within Section 4.1.3.6 of the PWS. Richey cites this section of the PWS in his report to identify the services at issue. (Richey Report at 28 & n.112.) Further, defendants have conceded that these services are allocable to the on-site support CLINs. (Br. in Opp. to Mot. to Exclude Richey at 9 n.3, ECF No. 343.) Accordingly, Richey's testimony on this topic is inadmissible as irrelevant.

(5) Distributing components to maintenance staff and tracking locations. These services are excludable from the *quantum meruit* claim because they fall within Section 4 of the PWS and were performed by on-site support personnel. The services at issue include distributing parts from inventory to the maintenance provider or repair source and tracking the location of those parts. (Richey Report at 30.) Clearly, one of the main functions of the on-site support personnel was to issue parts from inventory to the workers maintaining the aircraft. Further, Richey explains that Derco performed the tracking work using its computerized inventory-management software (known as IFS). (*Id.* at 31–32.) The obligation to provide and maintain this software, and to use it to "provide centralized parts and material management," is stated in § 4.30.1.2 of the PWS. Indeed, to describe these services, Richey cites language from the IWA that reproduces language from this part of the PWS. (*Id.* at 31 (bullet points).) Accordingly, Richey's testimony on this topic is inadmissible as irrelevant.

(6) Forecasting services. These services are excludable from the *quantum meruit* claim because they fall within Section 4 of the PWS. Richey describes these services as

"the activity of estimating the quantity of a product or service that users will require or purchase in a particular timeframe." (Richey Report at 32.) He explains that this is an important service because it ensures that the parts needed for maintenance will be on hand at the right time and that the Navy will not be storing excess inventory. (*Id.*) These services are described in § 4.30.1.1 and § 4.30.1.3 of the PWS, which I quoted above in the context of identifying required components. Further, Richey states that these services were provided using the IFS software, which is also within the scope of the PWS. *See* PWS § 4.30.1.2. Accordingly, Richey's testimony about forecasting is inadmissible as irrelevant.

(7) Training of personnel. These services are excludable from the *quantum meruit* claim because they involved training and supporting the on-site logistics support personnel. Richey describes these services as training a "staff of logisticians" (Richey Report at 34) and his discussion focuses on "the onsite labor force" (*id.* at 35–36). Although the training was provided by "Derco employees from Milwaukee" (*id.* at 36), any such training would still fall within the scope of the on-site support CLINs because SSSI's agreement to provide the on-site staff implied providing *trained* staff rather than staff unable to perform the work. *See Patzer*, 2023 WL 6883637, at *27 ("With respect to the Milwaukee-based personnel, their work would fall within the fixed-price CLINs to the extent they were performing work that was properly allocable to those CLINs. The fact that they worked in Milwaukee rather than on-site is not dispositive of whether they were performing fixed-price work."). Accordingly, Richey's testimony about training on-site personnel is inadmissible as irrelevant.

(8) Transporting and Tracking Components. Much of this section of Richey's report describes tracking functions performed by on-site support staff using the IFS system. To the extent Richey's testimony concerns these services, it is inadmissible as irrelevant because those services are within the scope of § 4.30.1.2 of the PWS, which specifies the required tracking and records functions of the IFS system. However, some of this testimony relates to order-processing services performed by Derco's accounting personnel. Richey notes that "[t]he Derco Accounts Payable department tracked the freight charges to ensure appropriate rates were charged," and that "Derco also determined the allocation of these expenses to the appropriate CLINs for each shipment." (Richey Report at 38.) These administrative functions are not within the scope of the PWS and were not performed by on-site support personnel. Thus, his testimony about those functions is relevant.

(9) Accounting Services. In this section of his report, Richey discusses two types of "accounting" services provided by Derco. The first is accounting for the parts and materials themselves using the IFS system. (Richey Report at 39.) These services are within the scope of § 4.30.1.2 of the PWS, which requires use of a computerized "Material Management and Accounting System." Thus, testimony about this form of accounting is inadmissible as irrelevant.

The second type of accounting Richey discusses is associated with order processing, such as receiving and paying all vendor invoices for parts and materials. (*Id.*) Because these administrative procurement services are outside the scope of the PWS and were performed by Derco's Milwaukee accounting and finance personnel

(*id.*), they are includable in SSSI's claim for *quantum meruit*. Accordingly, Richey's testimony about such services is relevant.

(10) Services related to IFS software. The services discussed in this section of Richey's report relate to setting up, using, and maintaining the IFS software Derco used to comply with § 4.30.1.2 of the PWS. That part of the PWS required the contractor to "possess and maintain a computerized Property Management System" and to use that system to "develop and maintain" specified data. Richey identifies six specific functions that were taken nearly word-for-word from the PWS and inserted into the IWA between SSSI and Derco. *Compare* Richey Report at 40 (bullet points) *with* PWS §§ 4.30.1.2.1, .2, .8, .9, .10 & .15. Because these services are within the scope of the PWS, they are not includable in SSSI's claim for *quantum meruit*. Accordingly, Richey's testimony on this topic is inadmissible as irrelevant.

(11) Implementing reporting systems for equipment status and metrics. In this part of his report, Richey continues his discussion of Derco's IFS software, but with a focus on Derco's using the software "to keep the government up to date on the status of aircraft and associated components." (Richey Report at 43.) These "reporting requirements" were imposed by Section 4 of the PWS and therefore are not includable in SSSI's claim for *quantum meruit*. *See* PWS §§ 4.4 & 4.30.1.2. Indeed, Richey again quotes language from the IWA that was lifted almost word-for-word from § 4.30.1.2 of the PWS. (Richey Report at 44 (bullet points).) Thus, this part of Richey's testimony is inadmissible as irrelevant.

However, Richey also discusses Derco's service in providing "supplier performance evaluations" relating to its vendors. (Richey Report at 45.) These services

would relate to SSSI's obligation to source parts from appropriate vendors, which is not a service included in Section 4 of the PWS. Thus, so long as these services were not performed by on-site support personnel, they would be includable in SSSI's *quantum meruit* claim. Richey's testimony about supplier performance evaluations is therefore relevant.

2. Substantive objections to opinions about quality

Richey's broad opinions about the overall quality of Derco's performance, as expressed in Sections VI.A and VII of his report, rely on his analysis of all eleven categories of services. However, as indicated in the prior section, most of these categories fall within the scope of the on-site support CLINs and therefore are not relevant to SSSI's claim for *quantum meruit*. To the extent that Richey intends to opine about the overall quality of the full set of services Derco provided to SSSI and the Navy, including on-site support, his testimony is inadmissible as both irrelevant and presenting a substantial danger of confusing or misleading the jury. *See* Fed. R. Evid. 402 & 403. However, Richey's opinions about the quality of the specific services that are includable in SSSI's claim for *quantum meruit* are relevant and do not present this danger. Therefore, I turn to the government's argument that those opinions should be excluded under Rule 702 as unhelpful and unreliable.

Richey's relevant testimony primarily relates to Derco's work in identifying sources of components and qualified vendors. (Richey Report at 22–25.) Here, Richey opines that Derco "met or exceeded what would be expected of a capable and professional provider of such vendor management services." (*Id.* at 25.) This testimony would help the jury understand the value of Derco's services. Moreover, the availability

of lay witnesses to provide their own opinions about Derco's services does not render Richey's expert testimony unhelpful. Richey has extensive experience in the area of logistics support, and that experience will help the jury identify reasonable expectations in the industry that could not be conveyed by lay witnesses. Although Richey does not put a precise value on Derco's services, he is not required to do so. Defendants intend to use his testimony to make the point that Derco's services were not valueless, and to rebut the government's main argument that Derco provided nothing of value other than parts and materials.

Richey's opinion testimony is also reliable. As an "experience" witness rather than a witness in a scientific field, Richey cannot be expected to apply a rigorous, scientific methodology to judging the value of Derco's services. *See Metavante Corp. v. Emigrant Sav. Bank*, 619 F.3d 748, 761 (7th Cir. 2010). Although his opinion must still rise above "mere *ipse dixit*," *id.*, I conclude that he has cleared this hurdle by explaining how he applied his expertise to the facts of the case. To form his opinions, Richey identified his own extensive experience as a manager of aircraft-logistics programs and then explained how the documents in the record indicate that Derco showed "attention to detail" and a "commitment to identifying, monitoring, and communicating with vendors." (Richey Report at 23–25.) That is sufficient to meet the reliability requirements of Rule 702. *See Metavante*, 619 F.3d at 761–62 (opinion testimony reliable where expert identified his experience in the industry and provided reasons why party's performance should have been considered satisfactory). To be sure, the government can point to documents in the record that undercut Richey's opinion. For example, the government points to a performance review in which the Navy complained that Derco

"failed to research and identify an authorized vendor for [certain parts]" and noted that this resulted in aircraft being out of service "due to a lack of parts maintenance." (ECF No. 260-30 at 2 of 4.) However, to be admissible, an expert's opinion does not have to be unassailable. *Metavante*, 619 F.3d at 762. The government is free to introduce evidence that contradicts Richey's opinion, but that evidence goes to the weight of his testimony rather than its admissibility.

The only other significant area in which Richey offers relevant testimony relates to the accounting associated with order-processing. Here, Richey opines that "Derco's accounting expertise and the application of the IFS management tool provided the government with valuable, accurate, and timely financial management information and processes." (Richey Report at 39.) Again, this testimony is helpful because it allows the jury to understand the value Derco provided. Further, the opinion is reliable because Richey explains how he applied his experience to the facts. *See id.* ("In my experience, I've encountered CLS contractors that failed to accurately track expenditures or other expenses and ultimately it significantly impacted mission performance."). Accordingly, this opinion is admissible.

VI. JOEL LESCH

A. Background

Lesch is a Certified Public Accountant and Certified Fraud Examiner with more than 35 years of experience in forensic accounting and government contracts. After I determined that SSSI and Derco violated the prohibition against CPPC contracting, the government asked Lesch to perform a forensic analysis to determine (1) the total amount the Navy paid to SSSI and (2) the total amount Derco paid to its vendors for the

parts involved in the CPPC transactions. After reviewing Derco's purchasing records, Derco's invoices to SSSI, SSSI's cost vouchers to the Navy, and the Navy's payment records, Lesch determined that the Navy paid SSSI $50,023,765 more than Derco paid to its vendors. Defendants move to exclude Lesch's testimony on the ground that it does not match the measure of damages set out in my earlier opinions.

B. Discussion

As stated above, under the measure of damages set out in my prior opinions, the government's damages are the difference between what the Navy paid SSSI and the amount of SSSI's hypothetical *quantum meruit* claim. The *quantum meruit* claim consists of the value of the parts and materials Derco supplied plus the value of Derco's procurement services that are properly allocable to the parts-and-materials CLINs. Defendants contend that, because Lesch does not account for the value of Derco's procurement services, his opinion about the government's damages is irrelevant and unhelpful to the jury.

However, the government does not intend to have Lesch offer a comprehensive opinion as to the amount of the government's damages. Instead, Lesch will testify about the forensic accounting that shows the difference between what the Navy paid to SSSI and the value of the parts and materials Derco supplied. This testimony is relevant because it provides at least a starting point for the jury to calculate damages. Once the jury knows the value of the parts and materials, it may add whatever value it assigns to the recoverable procurement services to that amount. To arrive at the government's total damages, the jury may subtract this sum from the total amount that, according to Lesch, the Navy paid to SSSI. Moreover, having someone with accounting expertise

identify the relevant payments between the Navy, SSSI, Derco, and Derco's vendors and perform the relevant arithmetic for the more than 100,000 parts transactions at issue would be helpful to the jury. Accordingly, Lesch's testimony is admissible even though he does not offer a bottom-line opinion as to the amount of the government's damages.[5]

VII. CONCLUSION

For the reasons stated, **IT IS ORDERED** that the government's motion to exclude the expert opinions of Patrick McGeehin (ECF No. 337) is **GRANTED IN PART** and **DENIED IN PART**.

IT IS FURTHER ORDERED that defendants' motion to exclude the rebuttal expert testimony of Janice Muskopf (ECF No. 333) is **DENIED**.

IT IS FURTHER ORDERED that defendants' motion to exclude the rebuttal expert testimony of Brandi Hall (ECF No. 335) is **GRANTED IN PART** and **DENIED IN PART**.

IT IS FURTHER ORDERED that the government's motion to exclude the expert opinions of Garry Richey (ECF No. 339) is **GRANTED IN PART** and **DENIED IN PART**.

IT IS FURTHER ORDERED that defendants' motion to exclude the expert testimony of Joel Lesch (ECF No. 331) is **DENIED**.

[5] In their briefs, the parties argue over their unsuccessful attempts to stipulate to the calculations underlying Lesch's testimony. While I encourage the parties to enter into stipulations that will save time at trial, their arguments relating to the stipulation are not relevant to the admissibility of Lesch's opinions. Thus, the government's motion to file a sur-reply brief relating to those arguments will be denied.

FINALLY, IT IS ORDERED that the government's motion to file a sur-reply in opposition to the motion to exclude the expert testimony of Joel Lesch (ECF No. 355) is **DENIED**.

Dated at Milwaukee, Wisconsin, this 6th day of March, 2024.

/s/ Lynn Adelman
LYNN ADELMAN
District Judge